IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR

JUDGMENT

Mahendra Singh & ors. Vs. Ghewarchand & ors.

S.B.CIVIL FIRST APPEAL NO.52/1997

Against the judgment and decree dated 30.10.1006 passed by the Addl. District Judge No.3 Jodhpur in Civil Suit No.135/1995 (146/1978).

Date of Judgment : 4th December 2006

PRESENT

HON'BLE MR.JUSTICE DINESH MAHESHWARI

Mr.Gaj Singh Bhati with Mr.M.S.Purohit for the appellants
Mr.L.R.Mehta with Mr.M.R.Mehta for the respondents

BY THE COURT:

PRELIMINARY

This is defendants' appeal against the judgment and decree dated 30.10.1996 passed by the Addl. District Judge No.3, Jodhpur in Civil Original Suit No.135/1995 (146/1978).

The dispute relates to a property called 'Girdhari Singhji Ka Nohra', (hereinafter referred to as 'the property in question'/ 'the suit property') situated outside Jalori Gate on the western side of Mahatma Gandhi Hospital at Jodhpur. The plaintiffs, 21 in number, stating themselves as the representatives of Oswal

Samaj; Oswal Community; and a representative body of the community named ‘Shri Oswal Singh Sabha’ filed the suit aforesaid on 19.12.1978 arraying the present appellants as defendants with the submissions that the defendants have started interfering in the suit property putting forward claim of one Kishan Singh, father-in-law of the defendant No.1 Gaj Singh (the appellant No.4 herein) as an alleged adopted son of the original owner of the property Girdhari Singh; though, according to the plaintiffs, the suit property was bequeathed by Girdhari Singh to Oswal Singh Sabha and was in their use, occupation and possession; they have inducted various tenants in different apartments and have raised constructions. According to the plaintiffs, various litigations ensued when the defendants started intermeddling and ultimately the property was put under attachment in the proceedings under Sec.145 Cr.P.C. putting a break on litigations. The plaintiffs, after narrating the attempts of interference by the defendants, submitted that it has become necessary to get the rights determined by the court so that mala fide disputes raised by the defendants may be finally settled and, therefore, the suit for declaration, possession and injunction was being filed.

The defendants, on the other hand, disputed the rights professed by the plaintiffs; denied execution of any will by Girdhari Singh in favour of their community or any

representative body of the community; denied possession of the plaintiffs or their community on the suit property; and also questioned the maintainability of the suit for it being barred by limitation. Other questions regarding frame of the suit, its competence as a representative suit and maintainability for want of registration of Oswal Singh Sabha as Public Trust were also raised.

After taking voluminous evidence, oral and documentary, adduced by the parties the learned trial court, by the impugned judgment and decree dated 30.10.1996, proceeded to decide all the material questions in favour of the plaintiffs and decreed the suit declaring the suit property to be of the ownership and in possession of Oswal Singh Sabha; issuing injunction against the defendants from interfering with the use and occupation of the suit property by the plaintiffs; and declaring that the plaintiffs were entitled to receive possession of the suit property from the Receiver.

The defendants have assailed the judgment and decree passed by the learned trial court in this appeal and in the substantial length of contentions Shri Gaj Singh Bhati, appellant No.4 arguing the appeal has urged that the basis of the claim of ownership of the plaintiffs, i.e. the will in question, is a forged document; that the plaintiffs were never in possession of the suit property; that Shri Kishan Singh, his

father-in-law, was adopted by the owner of the property Girdhari Singh and after Shri Girdhari Singh it was Kishan Singh alone who was in possession of the property as its owner; that attempts on the part of persons of Oswal community to interfere with the property were foiled; and that the suit filed on 19.12.1978 is clearly barred by limitation. Other issue regarding competence of the suit as a representative one were also taken up, however, during the course of submissions, Mr.Gaj Singh Bhati candidly gave up such objections and, in the opinion of this Court, rightly so. Learned counsel Mr.L.R.Mehta appearing for the plaintiff-respondents has refuted the submissions made on behalf of the appellants and contended that ownership and possession of the plaintiffs on the suit property are amply established on record; and that the suit with relief of possession is not barred by limitation.

Learned counsel for the parties have made elaborate submissions in relation to the questions regarding the claim of title to the property, possession of the suit property and limitation; and such submissions form the basis of the points for determination herein.

PLAINT AVERMENTS

The plaintiffs have averred in the plaint, after referring to the identity and location of the suit property that the same was

known as Shri Oswal Singh Sabha Bhawan and was earlier called Girdhari Singhji Ka Nohra. Shri Singh Sabha is an elected representative body of Oswal Samaj of Jodhpur having a sub-committee in the name of Oswal Education Fund Singh Sabha whose members are from Shri Singh Sabha. A Chief Trustee, who is changed from time to time by election and for other circumstances, manages the work of this sub-committee and manages the work relating to the properties of Shri Singh Sabha including letting out and recovering rent. The plaintiff No.2 is the Chief Secretary and the plaintiff No.1 is the Chairman of Shri Singh Sabha. According to the plaintiffs, there are several properties of Shri Oswal Singh Sabha, Samaj and Community in the city of Jodhpur and the suit property was one of them; that every member of Oswal community has got interest in the present suit regarding property; but such members were thousands in number and it was not possible to implead every member as a party and, therefore, the suit was filed in representative capacity with an application for permission to sue in representative capacity.

In relation to their predecessor-in-title, the plaintiffs have averred that one Chandmal Oswal a jewels-dealer of Jaipur had a concubine belonging to Ravana Rajput community who gave birth to two children, a son Girdhari Singh and a daughter Gulab Bai. The said Shri Girdhari Singh referred

himself as son of Chandmal and identified himself somewhere as Oswal, somewhere as Oswal Singhad and somewhere as Rajput. However, according to the plaintiffs, such offsprings were called Ravana Rajputs.

The plaintiffs have further averred that like his father, Shri Girdhari Singh had embraced Jain religion and was following its tenets; was attending on Jain Saints; and whatever property he had received from Chandmal or by way of his service income was treated by him being of Chandmal's blessings and had, therefore, aimed at devoting the same to philanthropic purposes. Girdhari Singh was got employed in Jodhpur Railways; he was residing at Jodhpur with his sister Gulab Bai; he had no natural born child and had taken in adoption a boy in the name of Ram Singh but unfortunately this boy expired unmarried; and he had no other near relative except the sister Gulab Bai. According to the plaintiffs, Girdhari Singh expired on 25.08.1923 and his sister constructed a canopy ('Chhatari') in his name on 01.05.1924.

Tracing their title, the plaintiffs have averred that the said Girdhari Singh, leaving aside a part of the property given to one Jawana Pital, bequeathed rest of the property on 05.07.1923 to Shri Oswal Singh Sabha for a boarding house and made it clear that if boarding house be not established, then the income of the property may be used for Sardar

School or Oswal Jain Kanya Pathshala or both. Girdhari Singh bequeathed another part of the property admeasuring 30½ x 7 yards to his beloved servant Jawana Pital on 07.08.1923. It has been averred that the will made in favour Shri Oswal Singh Sabha was got registered on 05.07.1923; the will in favour of Jawana was got registered on 10.08.1923 and in the later will in favour of Jawana, the previous will dated 05.07.1923 was also referred. The plaintiffs have alleged that the will was scribed by Pratapmal Advocate of Chief Court; that Ganeshilal Agarwal and Ambadas Kalla, Advocate of Chief Court stood witnesses; that at the time of registration, there were two more attesting witnesses; and that after the death of Shri Girdhari Singh a stone arch was placed on the gate inside the property proclaiming it having been presented by Girdhari Singh to Shri Sangh for use of Oswal children of Sardar School. In the year 1923 when the property was bequeathed, it consisted of certain quarters and apartments but not the shops contiguous to the road that were constructed by Singh Sabha in the year 1941; and at the entrance of the property the name 'Shri Oswal Singh Sabha Bhawan' was specifically inscribed.

The plaintiffs have referred to the facts in confirmation of the said testaments that Shri Jawana moved application for grant of patta on the basis of the will executed in his favour

and he referred to the will executed in favour of Oswal Singh Sabha too. It has also been averred that Girdhari Singh bequeathed all his moveable property to his widowed sister Gulab Bai and while bequeathing his immoveable properties to Oswal Singh Sabha directed that his sister would be permitted to occupy the two storied quarter she was residing at and would further be paid Rs.25/- per month by Oswal Singh Sabha for maintenance. Therefore, Gulab Bai was accommodated in quarter No.8 and was paid Rs.25/- per month maintenance that was increased to Rs.50/- and then to Rs.70/- per month at her request and such payments were duly entered in the regularly kept accounts of Oswal Singh Sabha. According to the plaintiffs, the property in question was continuously managed by elected representations of Oswal Singh Sabha and they had employed the persons to recover rent from the tenants and to get executed the rent notes.

The plaintiffs have further averred that Gulab Bai also had the same philanthropic motivations and on 10.03.1939 she too executed a will bequeathing all her movebles including gold ornaments, cash and other household items to Jain Kanya Pathshala, Moti Chowk and Phoolchand Jain Kanya Pathshala, Singh Pole after making provision of Rs.500/- for Brahmins of Gangaji; and her last rites were also

performed by Oswal Singh Sabha; the value of gold ornaments was entered in the accounts of Samaj; and the expenditure incurred in construction of five shops contiguous to the road in the year 1941 after taking permission from the concerned Department was also entered in the account books.

The plaintiffs have further averred that the suit property consisted of various apartments and open land, in all measuring 14777.82 sq.ft; that an application was moved before the Development Officer of the then Marwar State for issuance of patta on 23.11.1923 whereupon case No.90/1939-40 was registered and in accordance with law, after enquiry, patta No.37 dated 09.11.1945 was issued in favour of Singh Sabha of Oswal community of Jodhpur. According to the plaintiffs, no objection was raised regarding the said patta by anybody nor could be raised now. After the death of Girdhari Singh, the property has remained in power, possession and occupation of Shri Oswal Singh Sabha only and with the patta having been finalised in their favour, no other person was entitled to stake any claim to the property.

It has further been averred that the rent was regularly received and rent notes were executed and receipts were issued according to the quarter numbers and the Chief Trustee adopted several proceedings for recovery of rent and

ejectment and various decrees were passed by different courts. Thus, according to the plaintiffs, the property in question remained as the property of ownership of Shri Oswal Singh Sabha after death of Girdhari Singh and none else had or shall have any right in relation thereto.

After stating this much on the assertion of title and possession, the plaintiffs have taken up averments in paragraph 19 of the plaint in the manner that mostly the persons of the community of the defendant No.1 (appellant No. 4) were living in the suit property as tenants; and in several cases (against the tenants) that were filed on the ground of non-payment of rent, the defendant No.1 was engaged as lawyer but he never raised any objection in the written statements filed in the years 1963, 1964 and 1965. According to the plaintiffs, defendant No.1 hatched the conspiracy in the year 1966 to somehow grab the property and in furtherance thereof, he put forward his father-in-law Kishan Singh son of Raghunath Singh as adopted son and sole heir of Girdhari Singh. The said Shri Kishan Singh was living at Surendra Nagar, Gujarat and was earlier resident of Jodhpur having his properties at Makrana Mohalla, Killi Khana, Jodhpur; as Kishan Singh was not competent enough to answer all the questions, the defendant No.1 got executed a power of attorney in his favour; that Kishan Singh always

resided with Thakur Mahendra Singh of Surendra Nagar and expired thereat only; and that the claim of Kishan Singh's adoption by Girdhari Singh was a false and cooked up claim. The plaintiffs have thereafter averred that the defendant No.1 attempted to remove the proof available on the property, destroyed stone scribing and then handed over receipts to the tenants without any authority and thereby started making claim (to the property) mala fide.

According to the plaintiffs, Oswal Singh Sabha wanted to construct a hostel as per wishes of Girdhari Singh and, therefore, quarters were not let out further after being vacated by the tenants; that in the month of December 1966 several quarters were demolished for the purpose of starting construction but the defendant No.1 instigated the tenants by extending receipts without recovering any rent and asked the tenants not to pay rent to the Rent Collector of Shri Oswal Singh Sabha. This led to a tense situation at the site and thereupon in the month of December, 1966 the SHO, Sardarpura submitted the matter before the City Magistrate, Jodhpur under Section 145 Cr.P.C. and obtained an order for attachment of the property and thereafter the Tehsildar, Jodhpur was appointed Receiver who was recovering the rent since December, 1966.

The plaintiffs have further averred that on 18.09.1975 the City Magistrate referred the matter to the Civil Court under Section 146 Cr.P.C. that was pending for long and there was likelihood of it taking further time in issuing final order; and even otherwise the said case would only determine the possession two months prior to the date of passing of preliminary order. The defendants No.2 to 5 alleging themselves as heirs of Shri Kishan Singh and at the instigation of and in conspiracy with defendant No.1 were attempting to destroy and grab the suit property without any title and the property was in bad shape and the rent was also not being recovered resulting in obvious loss to Shri Oswal Singh Sabha. In these circumstances, it has become necessary that the rights be got determined from the court so that the dispute raised mala fide may be quelled and, therefore, this suit for declaration, possession and injunction is being filed.

The plaintiffs have also referred to their water connection meter of consumer No.7047 at the premises in question and have alleged the same was stolen by defendant No.1 so as to destroy the proof of ownership of Oswal Singh Sabha. It has also been averred that the defendant No.1 wanted to cause loss to Shri Oswal Singh Sabha and to destroy all the evidence of their ownership; and that after breaking open the locks of shops Nos.2 and 5, they

were let out to other persons without any authority. On coming to know about it, criminal cases were lodged against defendant No.1 and his henchmen and one of them, Om Prakash, entered into compromise with Oswal Singh Sabha; and against others, the cases were dropped for want of eye-witnesses. The defendant No.1 filed two suits for damages that were dismissed and the action of the defendant No.1 was found illegal. It has been pointed out that Kishan Singh had expired on 05.01.1974 and the defendants Nos.2, 4 and 5 were his heirs who had been made parties in the proceedings under Section 145; and the defendant No.1 has attempted to allege his son Mahendra Kumar, defendant No.3 being adopted by Kishan Singh so as to continue the proceedings even after Kishan Singh and, therefore, he was also impleaded as defendant. According to the plaintiffs, cause of action arose in the month of December 1966 when City Magistrate attached the property and when the defendants in the name of deceased Kishan Singh staked claim to the property.

The averments regarding interference by the defendants for which suit was necessitated as made in paragraphs 21 to 23 of the plaint have a direct bearing on the questions involved in the case and are, therefore, reproduced in extenso hereunder:

21)- यह है कि प्रतिवादी नं. 1 ने जायदाद मुतनाजा पर जो सबूत जाहिरा तौर पर थे उन्हें मिटाने का प्रयास किया और जिस सिलालेख का जिक्र उपर किया गया है उस सिलालेख को मिलावट करके तोड़ दिया है। इसके अलावा अपना हक हकूक उत्पन्न करने के लिये सन् 1966 में रसीद छपवाई और किरायेदारों से कोई किराया वगैरा न लेते हुये भी और बिना किसी हक अधिकार के प्रतिवादी नं. 1 ने स्वयं ने सन् 1966 की तारीखें की रसीदें काटकर किरायेदारों को दे दी और इस तरह बदनियति से अपना क्लेम बताना वो जताना शुरू किया। चूंकि ओसवाल सिंह सभा श्री गिरधारी सिंह जी के ईच्छा के अनुसार इस स्थान पर होस्टल बनाना चाहता था इसलिये ज्यों ज्यों क्वाटरस खाली होकर कब्जे मिले उनको आगे किराया नहीं दिया गया और दिसम्बर,1966 में काफी क्वाटरस गिरवाये गये ताकि तामीर का काम शुरू किया जा सके। प्रतिवादी नं. 1 ने किरायेदारों को काफी भड़काया प्रलोभन दिया और बिना रूपये लेकर रसीदें गलत तरीके से देना शुरू कर दिया और उन लोगों को स्पष्टत: कह दिया कि श्री ओसवालसिंह सभा के रेन्ट कलेक्टर को किराया न दें। इस प्रकार किराये की अदायगी वो अन्य मुद्दों पर स्थिति गंभीर मौके पर हो गयी और नुक्से अमन का अंदेशा हो गया जिस पर दिसम्बर 1966 में एस.एच.ओ. सरदारपुरा, जोधपुर ने दफा 145 जाब्ता फौजदारी में श्री सिटी मजिस्ट्रेट, जोधपुर की न्यायालय में मुकदमा करके यह जायदाद कुर्क कराने का आदेश लिया और उसके पश चात तहसीलदार, जोधपुर को रिसीवर नियुक्त कर दिया, जो दिसम्बर,1966 केबाद से तमाम किरायेदारों से किराया वसूल कर रहे हैं। श्री सिटी मजिस्ट्रेट, जोधपुर के यहां इतने अरसे तक कार्यवाही जैर तजवीज थी मगर दिनांक 18.9.75 को फैसला करके दीवानी अदालत को मुकदमा दफा 146 जाब्ता फौजदारी में रेफर कर दिया गया जो मुकदमा श्री एडीशनल सिविल जज, जोधपुर की न्यायालय में हनोज चल रहा है। दिसम्बर,1966 में काफी क्वाटर गिराये गये थें और तहसीलदार रिसीवर का कब्जा कानूनी है। मुकदमा इतने अरसे से जैर तजवीज है जिसके फाईनल होने में काफी समय लगने की आशंका है और उस मुकदमे में भी प्लीमीनरी ऑर्डर जारी होने के दो माह पूर्व कब्जा के बाबत ही तसफीया होगा। प्रतिवादीगण नं.2 ता 5 जो अपने आपको श्री किशन के वारिस बतलाकर प्रतिवादी नं. 1 को मिलावट वो सिखावट पर जायदाद मुतदाविया को बरबाद करने वो हडपने की फिराक में है और गलत वो गैर कानूनी तरीके से लेश मात्र भी टाईटलस न होते हुवे भी बदनियती से अपने हक हकूक बतला रहे हैं। जायदाद की हालात बहुत खराब हो गयी है। किराया बराबर वसूल नहीं हो रहा है। और इन तमाम का नुकसान

जाहिरा तौर पर श्री ओसवाल सिंह सभा को हो रहा है वो होगा। इन हालात में यह जरूरी है किइस न्यायालय से हक हकूक तय करवा लिये जायें ताकि हमेशा के लिये जो तनाजों शुरू किया गया हे बदनियती वो गलत तरीके से और चल रहा है वो निश्चय हो जाये इसलिये यह दावा बाबत इस्तकरार हक कब्जा वो हुक्म इम्तनाई का हमरा पेश किया जा रहा है।

22)- यह है कि ओसवाल सिंह सभा के नाम का पानी का मीटर गत 17-18 वर्षों से लगा हुआ था । कन्जूमर नम्बर 7047 उस मीटर का प्रतिवादी नं. 1 ने अन्य लोगों से साजिस करके चुरा लिया ताकि ओसवाल सिंह सभा की मिलकियत वो कब्जे के बाबत सबूत खत्म हो जाये। यही नहीं प्रतिवादी नं. 1 ने कई गलत वो गैर कानूनी कार्यवाही कानून को अपने हाथ में लेकर लोगों से मिलावट करके अपने स्वयं के फायदे के लिये किये और श्री ओसवाल सिंह सभा को हर तरह से नुकसान पहुंचाया और यही चाहा कि सबूत वो मिलकियत के बाबत शहादत खत्म कर दी जाये। ओसवाल सिंह सभा की कब्जा सुद दुकान नं. 2 तथा 5 के नवंबर 1966 में ताले तोडकर अन्य लोगों को बिना किसी अधिकार के किराये पर दे दी । किरायेदारों से मालूम पडने पर प्रतिवादी नं. 1 वो उसके साथियों के खिलाफ मुकदमा फौजदारी चलाये गये जिसमें ओमप्रकाश ने ओसवाल सिंह सभा से मिलकियत वो कब्जा मंजूर करके राजीनामा किया और दीगर के खिलाफ चश्मदीद गवाह न होने से फौजदारी मुकदमा खारिज किया गया जिस पर प्रतिवादी नं.1 ने ओसवाल सिंह सभा के खिलाफ 11000-11000 के हर्जाने के दो दावे किये जो दावे आलिये हाई कोर्ट से प्रतिवादी नं. 1 का कार्य गलत बेजा वो गैर कानूनी मानकर खारिज किये गये। इसके अलावा अन्य कई जायदादों पर कब्जे करने चाहे वो करवाये मगर 145 जाप्ता फौजदारी की कार्यवाही होने से तमाम मुकदमे वो कार्यवाहियें बन्द हो गयी। इस प्रकार प्रतिवादी नं. 1 का या श्री किशनसिंह का इस जायदाद के सम्बन्ध में कोई कानूनी हक अधिकार कब्जा नहीं है और न कभी था । श्री किशनसिंह का देहान्त तारीख 5.1.74 को हो गया जिसके कायम मुकामान प्रतिवादी नं. 2, 4 व 5 है और चूंकि 145 की कार्यवाही में इन्हें फरीक बनाया गया है इसलिये यहां भी फरीक बनाया जाता है। प्रतिवादी नं. 1 ने श्री किशन सिंह की वृद्धा अवस्था आदि को देखकर अपने लडके महेन्द्र कुमार प्रतिवादी नं. 3 को जो उसके साथ वो शामिल रहता है उसे श्री किशन सिंह के गोद बतलाया है ताकि उसके देहान्त के बाद भी कार्यवाही खत्म न हो जाये इसलिये उसे भी प्रतिवादी बनाया जा रहा है।

23)- बिनाय दावा दिसम्बर,66 में जब से जायदाद सिटी मजिस्ट्रेट की अदालत से कुर्क हुई और प्रतिवादीगण ने वो मृतक श्री किशन सिंह के नाम से जायदाद के बाबत हक हकूक बतलाये तब जोधपुर में उत्पन्न हुवा।"

Putting the valuation at Rs.51,000/-, the plaintiffs filed the suit on 19.12.1978 by presentation of plaint on a court fees of Rs.1,308/- and prayed for the following reliefs:-

"(1) इस्तकरार हक की डिक्री बहक वादीगण खिलाफ प्रतिवादीगण इस अमर की सादिर की जावे कि अर्जी दावा के पद नं. 1 में वर्णित जायदाद श्री ओसवाल सिंह सभा, जोधपुर की है और प्रतिवादीगण को मृतक श्री किशन सिंह का उसमें कोई मालिकाना हक अधिकार या दखल किसी प्रकार का नहीं है।

(2) हुक्म इम्तनाई दवामी की डिक्री बहक वादीगण खिलाफ प्रतिवादीगण इस अमर की सादिर की जावे कि वो मुतदाविया जायदाद के बाबत कोई किसी तरह का क्लेम कार्यवाही अथवा दखल बाजी नहीं करे और उन्हें ऐसा करने के लिये हमेशा के लिये रोका जावे।

(3) उक्त वर्णित जायदाद का कब्जा रिसीवर से वादीगण को दिलाया जावे।

(4) खर्चा मुकदमा वादीगण को प्रतिवादीगण से दिलाया जावे।

(5) दीगर दादरसी मुफीद वादीगण हो दिलाई जावे ।"

WRITTEN STATEMENT(S)

The defendants have filed separate written statements. The defendant No.1 Shri Gaj Singh in his vastly elaborated written statement has propounded various theories and has

levelled various allegations. The summary of the stand of the defendant No.1 could be taken into comprehension thus:

While denying averments in Paragraph 1 of the plaint, the defendant No.1 has asserted that property in question was not known by the name of 'Shri Oswal Singh Sabha Bhawan' and right from the year 1914 it was famous as 'Girdhari Singhji Ka Nohra' only. The four boundaries stated in the plaint have also been disputed with reference to the alleged four boundaries in the year 1914 and the boundaries as existing in the year 1941 after alleged raising of construction by Shri Kishan Singh in the year 1940. It has been asserted that there were two portions at the site on 19.12.1978 and they existed yet; a lane separated them and there was no lane on the southern side as alleged in the plaint.

In relation to the averments in Paragraphs 2 and 3 of the plaint regarding Oswal Samaj, Jodhpur and the properties of the community, it has been alleged that 'Shri Singh Sabha' was a committee of Rajputs of a particular status and was not related with any member of Oswal community and the plaintiffs have merely attempted to create confusion with the names 'Shri Singh Sabha' and 'Shri Oswal Singh Sabha'. The competence of the suit by the named plaintiffs has also been questioned.

The averments regarding Chandmal Oswal, his concubine and Girdhari Singh and Gulab Bai being their offsprings have all been denied. The defendant has asserted that said Oswal Chandmal of Jaipur and his concubine have no co-relation with the owner of the suit property Rajput Girdhari Singh. The defendant has given out pedegree as divulged by the elders and has stated that Rajput Chandmal's wife was Phool Kanwar and they had three offsprings, Bhuri Bai, Girdhari Singh and Gulab Bai; that owner of the suit property Rajput Girdhari Singh never referred himself as Oswal and in every relevant proceedings including the case in relation to the Lalwani Jeevan Chand in the year 1912, in the registered mortgage deed of Mutha Likhmichand Manakchand, in the sale deed, in the patta and in the name plate of 1915 he mentioned his caste as Rajput. The averments regarding origin of Ravana Rajput community have also been denied. The averments taken by the plaintiffs about Girdhari Singh embracing Jain religion and being motivated to divert his property for philanthropic purposes for Jain religion have all been denied as false and concocted.

The averments regarding adoption of Ram Singh by Girdhari Singh have also been denied and it has been pointed out that brother-in-law of Girdhari Singh got him employed in Durga Press, Ajmer and then Girdhari Singh, on

coming across an advertisement, joined services with Railways. Gulab Bai lived with her sister Bhuri Bai at Ajmer-Jaipur and with her in-laws; and after being widowed she lived with her brother Rajput Girdhari Singh in the suit property at Jodhpur.

It has been asserted that Rajput Girdhari Singh was not having any natural born child and he adopted Kishan Singh on 22.10.1919 at Ajmer; that Girdhari Singh solemnised the marriage of this adopted son with the defendant No.2 in the year 1921 at the suit property; and that Kishan Singh was always known as son of Girdhari Singh and performed his last rites. It has been submitted that Kishan Singh was natural born son of Raghunath Singh and even if he has referred the name of his father somewhere as Raghunath Singh that was of no effect.

The averments regarding date of death of Girdhari Singh as 25.08.1923 and his sister Gulab Bai placing a canopy in his name have been denied with the averments that Girdhari Singh, the owner of the suit property, died on 07.08.1922 and not on 25.08.1923. The defendant has maintained that the plaintiffs and the members of Oswal community were not aware of the correct date of death of Girdhari Singh and they firstly choose the date of 25.07.1923 and created evidence to that effect; but when Munim of Oswal

Singh Sabha Mohan Raj came to know on 12.02.1967 that there was another will in the name of Jawana bearing the date of 10.08.1923, then copies were obtained by Mohan Raj from the file of Jawana and then the said Munim with their counsel attempted to change the date of '25.7.1923' to '25.8.1923' by overwriting the numeral '7' with the numeral '8' and this fact was divulged before City Magistrate by the defendant No.1 and such overwritings were got distinctly marked. It has been pointed out that the stone scribing has not been produced despite orders and the canopy has also been destroyed. The averments regarding the will in favour of Jawana have also been denied.

Then the defendant No.1 in various sub-paragraphs to paragraph-8 of written statement has averred that Rajput Girdhari Singh had constructed the house after purchasing the property under registered sale deed from Rao Raja Hari Singh on 30.06.1911; construction was also raised on a part marked ABCD in the plan that was the property of Jeevan Chand Oswal who filed a suit against Girdhari Singh through Pratapmal and the matter went to Mahakma Khas wherein it was ordered on 14.10.1913 that a land in the vicinity be given to Jeevan Chand at the instructions of Hari Singh and payment whereof shall be made by Rajput Girdhari Singh; and then Jeevan Chand got patta of the land on

southern side of land ABCD and at the same time Girdhari Singh got the patta in relation to his property. Girdhari Singh was in debts and, therefore, he mortgaged the property for Rs.1,919/- with Oswal Likhmichand Manak Chand and completed the construction and put his name board. It has been maintained that after the death of Girdhari Singh, Kishan Singh has taken over the entire property and the documents; and till his death, only Kishan Singh remained the owner of the property.

It has been asserted by the defendant that in the year 1930 the original patta was with Kishan Singh that was produced before the Development Department. It has been alleged that there had been concentrated efforts on the part of Oswal community to take over property of Rajputs by all fair or foul means; and foul means were adopted for grabbing the property of Girdhari Singh. It has further been asserted that the will dated 05.07.1923 was forged by Pratapmal Mehta who was the counsel for Jeevan Chand in the suit against Girdhari Singh and his friends stood as attesting witnesses and the will was got registered through his relative who was Superintendent of Registration, Marwar without production of original pattas and it was also mentioned in the will about handing over of a part to Jawana. According to defendant, after noticing the fact that Jawana was not having any

document, another will was forged in the name of Jawana on 10.08.1923 and that was also similarly got registered without production of original patta. The defendant has asserted that original patta never came in the hands of Pratapmal or Jawana and they started asserting ownership rights on the basis of the wills only.

It has further been asserted that the will in question had not seen the light of day before the year 1966 and other 93 cases were only the off-suits without reference to the will. It has also been pointed out that on 03.06.1930 Gulab Bai moved application for permission to construct rooms and verandah by production of pattas that also shows that Girdhari Singh never gifted the property to Shri Singh Sabha. According to the defendant, the two wills are false and fabricated and do not bear the signatures of owner of property and the will for Jawana Pital had been created only to strengthen the will dated 05.07.1923. The will in question has also been assailed with the submissions that it was entirely unnatural for the owner of the property to have left his dear sister high and dry and at the mercy of other community. The averments regarding the will of Gulab Bai have also been denied with the same submissions that the plaintiffs have tried to confuse between Rajput Gulab Bai and Gulab Kanwar daughter of Oswal Chandmal. The alleged will has been

denied with the submissions that Gulab Bai was putting thumb impressions only and this will with her signatures was also a fabricated document. All the averments regarding maintenance of Gulab Bai and her last rites have also been denied.

The averments regarding placing of arch have been denied with the submissions that on the gate, there was of course a name board existing till 19.12.1966 bearing the inscription of "Girdhari Singh son of Chandmalji Rajput, Head Clerk, Loco J.B. Railway, Jodhpur". The entries in the accounts books of Singh Sabha have also been denied and so also of raising of construction by Oswal Singh Sabha. It has been contended that five rooms, verandah, staircase and terrace on the outer side land were constructed by Kishan Singh and Gulab Bai and the plaintiffs were only trying to confuse the identity of property by mixing old property with the new one and that there was no name inscription of Oswal Singh Sabha on the property of Rajput Girdhari Singh. According to the defendant, new shops were constructed later on by Kishan Singh and Gulab Bai in the year 1940-41 by acquiring new land and only they were looking after the property inducting tenants and repairing the property. The defendant has denied the fact of any such construction having been raised by Oswal Singh Sabha and has submitted that

Kishan Singh and Gulab Bai had taken over possession of other land in front of Girdhari Singh's property and obtained permission for raising of construction but the record has been altered and else there was no question of extending any construction permission in the name of Singh Sabha. It has been asserted that suit property of Rajput Girdhari Singh and new building were separated by a lane and the property on which Kishan Singh and Gulab Bai raised construction in the year 1940-41 was not the part of property of Girdhari Singh's Nohra in the year 1922; it was the land of Rao Raja Hari Singh that later on came in possession of Kishan Singh. The defendant has also submitted that if the court comes to the conclusion that the construction was not raised by Kishan Singh, the fact remains that he was in possession of the said construction with the old house for over 12 years as an owner in the complete knowledge of the plaintiffs and even on adverse possession of defendant Nos.2 to 5 the suit was liable to be dismissed.

The averments regarding tenants and rent notes have also been denied with the submission that Oswal Singh Sabha was not a juristic person not capable of acquiring any property nor any portion of the property was let out; that receipts and rent notes were all false and fabricated; and

according to defendant No.1, the rent was always recovered by Kishan Singh and Gulab Bai.

The averments regarding patta have also been denied with the submissions that measurement of the suit land was 3822 ½ sq.yard and it has been submitted that copy of patta was a fabricated document; that entire proceedings were kept concealed, therefore, no objection could have been raised; that patta has not become final and anybody could challenge the same; that Development Officer, Jodhpur had no authority to issue patta in the name of Oswal Singh Sabha; and all the averments regarding application for issuance of patta were vague and incomplete. The defendant has pointed out that according to the plaintiffs, the application was moved on 23.11.1923 whereas the case thereupon was instituted in the year 1939-40 and patta No.37 was issued on 01.01.1949 that shows that all the proceedings are false and patta was obtained after 26 years by all manipulations; that patta was fabricated and a waste paper and the property has continued in the ownership and possession of Kishan Singh and every attempt to take over possession by Oswal Singh Sabha was foiled.

The averments regarding Shri Oswal Singh Sabha letting out the property or recovering the rent have also been denied with the submissions that there were no

distinct quarter numbers and all the rent notes were fabricated. The averments relating to other rent ejectment suits have been answered with the submissions that such suits against the tenants were all false and the decrees obtained therein were of no effect. The defendant has submitted that there was no possession of Oswal Singh Sabha on the land in question.

The allegations of the defendant hatching any conspiracy have been denied and it has been submitted that there had been regular efforts on the part of Oswal Singh Sabha to take possession of the apartments from the tenants of Kishan Singh but they did not succeed and Kishan Singh continued to remain in possession of the property as owner and tenants used to make payment of rent to either Kishan Singh or Gulab Bai and never paid any rent to the Rent Collector of Oswal Singh Sabha. It has been averred that admittedly Girdhari Singh did adopt a son; and it was Kishan Singh who was adopted as per family customs at Ajmer and Shri Kishan Singh has not gone in dowry anywhere and such false allegations were made only in order to malign.

The allegations of defendant No.1 seeking to obliterate the apparent evidence at the property in question have been denied and it has been maintained that no part of the property ever came in possession of Oswal Singh Sabha though it has been suggested that in the month of December

1996 some 500 persons had forcibly demolished several quarters; that in the month of December 1966 the members of Oswal Singh Sabha created the conditions of breach of peace; and that the Station House Officer, Sardarpura at the instance of Shri Indra Nath Modi obtained orders for attachment of the property by lodging the case under Section 145 Cr.P.C. It has been conversely alleged that Oswal Singh Sabha had removed the name board of Girdhari Singh. The defendant has asserted that receipt books were not got printed in the year 1996 but they were existing earlier too and the rent was collected in the year 1964 too; that the receipts were issued by the defendant at the instructions of Shri Kishan Singh; that there was no forcible recovering of the rent; that the fact of Kishan Singh's physical possession and so also of his tenants is clearly established on record; and it were the plaintiffs who intended to destroy the property.

It has been averred that the members of Oswal Singh Sabha wanted to take possession of the property in question but when all their attempts failed then with a view to remove the possession of Kishan Singh, nearly 500 persons entered the property on 19.12.1966 with police help and within two hours demolished 8 apartments and then false cases were lodged against the defendant No.1, Shri Kishan Singh and various tenants and arrest warrants were got

issued. The allegations about theft of water connection meter of consumer No.7074 have also been denied and so also the averments about Om Prakash entering into settlement with Oswal Singh Sabha and it has been asserted that Om Prakash was misguided for some time but then he too contested against Oswal Singh Sabha.

The averments about accrual of cause of action in the month of December 1966 have been denied and it has been asserted that the rights of the defendants came in existence in the year 1919 itself and the members of Oswal Singh Sabha had seen Shri Kishan Singh recovering the rent from the tenants much prior to December 1966 and, therefore, the cause of action had accrued much prior to December 1966; and on 19.12.1978, the suit was definitely beyond limitation and, therefore, a strange theory of accrual of cause of action in the month of December 1966 was put forward.

The defendant has taken several averments dealing with different aspects in the additional submissions from page 40 to page 108 of the written statement, the gist whereof could be summarised thus:

a) that the will dated 05.07.1923 had not been registered according to law;

b) that Shri Singh Sabha was an unregistered society incapable of acquiring property itself and, therefore, the transfer under the will was a nullity;

c) that Shri Singh Sabha and Oswal Singh Sabha are different entities and the will has been made in favour of Shri Singh Sabha and the plaintiffs do not belong to Shri Singh Sabha;

d) that the named testator of the will was a fake personality;

e) that the suit was not maintainable under Order 1 Rule 8 of the Code of Civil Procedure;

f) that the alleged Oswal Education Fund Singh Sabha was an unregistered body and till the trust was registered and the suit in its present form was not maintainable;

g) that the trust referred in the will was a Public Charitable Trust and that being unregistered, the suit was not maintainable;

h) that the plaintiffs were aware of the adoption of Kishan Singh much prior to 1966 but they did not take any proceeding in relation thereto and they were estopped from challenging such status now; similarly they were aware of adoption of Mahendra Singh in the year 1962 and were not entitled to question the same now;

i) that the plaintiffs's alleged rent notes and receipts do not relate to the true tenants; that Oswal Singh Sabha members never recovered rent from the tenants; that their accounts were all fabrications containing false entries;

j) that the alleged decrees do not relate to the real and rightful tenants and the defendants were not parties thereto;

k) that the plaintiffs have merely created confusions about Chand Mal Rajput & Chand Mal Oswal; about Girdhari Singh Rajput & Girdhari Singh Oswal; and Kishan Singh & Ram Singh. The plaintiffs have also created confusions about the date of death of Rajput Girdhari Singh; about canopy; about Shri Singh Sabha & Shri Oswal Singh Sabha; about the name of the property; and about the arch at the property;

l) that the original patta was in possession of Girdhari Singh who had handed over the same to Kishan Singh and on 19.12.1966 when some part of the property was demolished, the defendant had seen Mohan Raj taking away the said document with him;

m) that even from the patta proceedings alleged by the plaintiffs, no rights are created in the Oswals; that the original patta of Girdhari Singh was never produced and for 26 years time was killed to remove the proof existing in favour of Rajput Girdhari Singh;

n) that upto the year 1954 all the proceedings were kept concealed and then all the records relating to Rajput Girdhari Singh were destroyed.

In the additional submissions detailed averments have been taken in relation to the actual possession of Kishan Singh and of his tenants. Regarding various suits filed by the members of Oswal community, it has been suggested that Kan Singh was an employee of Kishan Singh; that the tenants used to make payment to Gulab Bai and Kan Singh used to maintain accounts. In the year 1958 when Kishan Singh was at Himmat Nagar and Gulab Bai was unwell, Kan Singh filed the suits against the tenants and thereupon Kishan Singh removed him from service on 01.04.1959. The appellant has levelled various allegations on the members of the Oswal community hatching a conspiracy to grab the property and of taking up speculative litigation too. It has been suggested that false suits were filed against the tenants by stating arbitrary rate of rent. Allegations have also been levelled of lodging of false criminal cases and then prevailing upon the tenants to enter into settlements with the only proposition that they were to admit ownership of Oswal Singh Sabha. The defendant No.1 has alleged himself having been sought to be prevailed

upon by the members of Oswal community by extending allurements and so also threats.

In relation to the attempts to recover possession it has been averred that on 25.10.1966 possession was attempted to be taken through Sale Amin on the basis of certain decrees but they did not succeed and report was made by Mohan Raj to Police Station, Sardarpura on 26.10.1966; and then complaint was made on 29.11.1966 under Section 145 Cr.P.C. and thereafter the members of Oswal community decided on 11.12.1966 to demolish the property when all the attempts to recover possession failed; and in furtherance thereof the property was demolished on 19.12.1966 and then it was got attached.

The substance of submission of the defendant has been that despite efforts and attempts, the members of the Oswal community were not able to recover possession of the suit property though they adopted various proceedings and made various attempts.

The defendant has thereafter given details of the tenants and persons in possession of the suit property; of various attempts in relation to various apartments; and of several criminal and quasi-criminal proceedings against the defendant No.1 and so also against Kishan Singh. It has been suggested by the defendant in his written statement that

the plaintiffs had no title to the property and, therefore, always avoided to file a suit for possession and wanted Kishan Singh to file the suit that could be contested on the theory of adverse possession but because Kishan Singh had continued in possession and was not required to file the suit, therefore, ultimately the present suit was required to be filed by the plaintiffs under force of circumstances.

Separate written statements have been filed by Har Kanwar defendant No.2, Mahendra Singh defendant No.3, Mohan Kanwar and Naini defendants Nos. 4 and 5 that are in conformity with the detailed extensive pleadings taken by the defendant No.1 and need no repetition.

REPLICATION

It may be pointed out that the plaintiffs filed a replication on 07.08.1984 wherein, while generally denying the assertions and allegations of the defendants, the plaintiffs have averred that 'Singh Sabha' was the short form of 'Oswal Singh Sabha' and there was no such society of Rajput community in the name of 'Singh Sabha'; that Girdhari Singh was son of concubine of Oswal Chandmal; that his father was oswal hence he has referred himself sometimes as oswal though he was referred as Ravana Rajput; that he died on 25.08.1923 and if his date of death was mentioned otherwise for slip of pen, that was of no effect because it was clear even

from official record that he was alive beyond 07.08.1922; that plaintiffs were regularly in possession till the date of attachment. The plaintiffs have also denied additional submissions made by the defendants and have asserted that all the apartments in the property were in possession of the body represented by them and their tenants were residing thereat. Nothing additionally significant or noticeable is available in this replication other than the extensive pleadings already taken by the parties. However, it may be pointed out that while denying adoption of Kishan Singh by Girdhari Singh, the plaintiffs have asserted in paragraph-3 of replication that Girdhari Singh never adopted any person. This part of the pleading of the plaintiffs of course stands contrary to the pleadings taken in the plaint about adoption of one Ram Singh by Girdhari Singh who allegedly expired issueless.

ISSUES & EVIDENCE

On the pleadings of the parties learned trial court framed the following issues:-

> "1- क्या मकान मालिक गिरधरीसिंह ने वादग्रस्त मकान की वसीयत वादीगण की ओसवाल सिंहसभा के पक्ष में लिखकर रजिस्ट्री करवा दी ?
>
> 2- क्या मकान मुतदाविया पर ओसवाल सिंह सभा दि. 25-8-1923 से 23-12-1966 तक लगातार कब्जे में रही ?
>
> 3- क्या वादीगण को प्रस्तुत वाद मौजूदा शक्ल में प्रस्तुत करने का अधिकार नहीं है ?

4- क्या वाद अन्दर म्याद नहीं है ?

5- क्या वादी ओसवाल सिंहसभा एक पब्लिक ट्रस्ट है और वह ट्रस्ट एक्ट के अन्तर्गत रजिस्टर्ड नहीं होने से वाद प्रस्तुत नहीं कर सकती ?

6- अनुतोष ?"

After taking extensive oral and documentary evidence produced by the parties including testimony of 17 witnesses produced by the plaintiffs and 2 by the defendants and 6 volumes of documents, the learned trial court has proceeded to decide the suit by its impugned judgment and decree dated 30.10.1996.

SUMMARY OF THE FINDINGS OF THE TRIAL COURT:

The learned trial Judge took up for consideration in issue No. 1 as to whether the owner Girdhari Singh bequeathed the suit property by executing the will and getting it registered? With reference to the testimony of the witnesses PW-1, Jethmal; PW-2, Ranjeet Mal; PW-3, Ganesh Chandra Lodha; PW-9 Sohan Mal Mehta; and PW-11, Laxman Raj Calla the learned Judge found that the plaintiffs have been able to establish execution of the will dated 05.07.1923 (Ex. 50), it's scribing by Pratap Mal and it having been duly registered. Learned Judge also referred to the stand of the

defendants that Girdhari Singh expired on 07.08.1922 and found with reference to the admission of DW-1 Gaj Singh, of his being not in possession of documentary evidence in this regard, that such alleged date of death of Girdhari Singh was not proved. The suggestion of ownership of Kishan Singh as adopted son of Girdhari Singh was also rejected with the finding that the defendants have not been able to establish factum of such adoption and also for invalidity of any such adoption with reference to the requirement of law of the then Marwar State of compulsory registration of such adoption. The learned Judge referred to the fact that ultimately Patta Ex. 1 was issued by the Development Department in favour of Oswal Singh Sabha, and that was conclusive proof of the fact that the will was duly recognized by the State and after due enquiry Patta was issued . Therefore, issue No. 1 was decided in favour of the plaintiffs.

Issue No. 2 framed in this case raised the question in the manner as to whether Oswal Singh Sabha had been in possession of the suit property from 25.08.1923 to 23.12.1966, i.e. since after Girdhari Singh till its attachment by the City Magistrate? The learned Judge on this issue referred to the evidence led by the plaintiffs in relation to induction of tenants by Oswal Singh Sabha; various rent notes and rent receipts; recovery of rent from the tenants; various litigations against

the tenants and decrees granted in favour of Oswal Singh Sabha; maintenance allowance extended by Oswal Singh Sabha to Gulab Bai; water connection on the suit property in the name of Oswal Singh Sabha ; and construction permission accorded by Development Department on 24.02.1940 (Ex.49). Learned Judge also referred to the submissions of the defendants about Kishan Singh all through being in possession of the property and having been granted construction permission; of various criminal cases against defendant No. 1 and his acquittal therein; and of stone-scribing allegedly destroyed by the plaintiffs. Learned Judge after such reference to the evidence of the plaintiffs and contention of the parties proceeded to observe that the will Ex. 50 was executed in favour of the plaintiffs; that Patta Ex. 1 dated 09.11.1945 was also issued in their favour; that construction permission Ex. 49 was also issued in their favour; that they had raised construction and expenditure thereto was recorded in their books; that they have filed documents in relation to the proceeding against the tenants including suits and execution proceedings and so also rent notes and rent receipts; and such evidence establish their possession on the suit property. Learned Judge observed that merely in relation to some shops possession was attempted to the taken for which criminal case was registered against the defendant and

though he was acquitted for technical reasons by extending benefit of doubt; but merely for unauthorized possession on a fractional part of the property, it cannot be assumed that the defendants were in possession and that the plaintiffs were not in possession. Learned Judge referred to page 55 of the statement of defendant No. 1 and observed that if at all he had been able to take possession of Shop No. 5 and inducted a tenant Mohan Singh about one month and twenty three days before appointment of the receiver on 23.12.1966, then it cannot be assumed that the property was not in possession of the plaintiffs. Learned Judge also observed that the documents referred by the defendants do not show their having raised construction or the property having been in possession of Kishan Singh or his heirs after the death of Girdhari Singh.

The learned Additional District Judge took up for consideration issue No. 4 on the question of limitation and merely observed that the plaintiffs have averred in their plaint that the cause of action arose in December 1966 when the property was attached by the City Magistrate and when the defendant asserted their rights in the name of deceased Kishan singh. According to the learned Judge, the property was attached on 23.12.1966 and the suit was filed on 19.12.1978, hence the suit was filed within the period of 12

years. On these observations, issue No. 4 has been decided in favour of the plaintiffs and against the defendants. The discussion on issue No. 4 is reproduced *in extenso* hereunder:-

> "प्रतिवादीगण का आक्षेप है कि वादीगण का वाद समयावधि में नहीं है और उन्होंने वाद वादग्रस्त संपति का कब्जा प्राप्त करने का किया है अत: ऐसी स्थिति में कोई भी व्यक्ति अपने टाइटल व स्वामित्व के आधार पर 12 साल की अवधि में ही कब्जा प्राप्त कर सकता है इस संबंध में वादी ने अपने वादपत्र की मद सं० 23 में अंकित किया है कि वाद का कारण दिसम्बर,1966 में हुआ वादग्रस्त जायदाद सिटी मजिस्ट्रेट न्यायालय से कुर्क हुई और प्रतिवादीगण ने मृतक किशनसिंह के नाम से अपने अधिकार बताये। इस प्रकार सिटी मजिस्ट्रेट द्वारा 23 दिसम्बर,1966 को वादग्रस्त संपति को कुर्क किया गया एवं उक्त वाद दिनांक 19-12-78 को पेश हुआ इसलिये 12 वर्ष की अवधि में ही यह वाद प्रस्तुत हुआ है । ऐसी स्थिति में विवाद्यक सं० 4 का निर्णय वादीगण के पक्ष में व प्रतिवादीगण के विरूद्ध किया जाता है।"

It may also be pointed out that in issue No.3 the learned Judge has referred to the order passed by the court on 07.11.1983 granting provisional permission to the plaintiffs to sue in representative capacity and with reference to the averments in the plaint about innumerable persons of Oswal community having interest in the litigation and has observed that in this suit for declaration, injunction and possession, the persons of Oswal Samaj have common interest and the suit has been filed by the Chairman, Chief Trustee and other members in representative capacity that was in accordance

with law. In issue No.5 the learned Judge has referred to the findings on issue No.3 and has found that the provisions of Rajasthan Public Trusts Act, 1959 do not apply to the present matter. As noticed hereinbefore, though Shri Gaj Singh Bhati initially raised contentions against the findings on these issues but during the course of hearing gave up such contentions and, therefore, there is no necessity to dilate further on these issues.

The learned Judge has observed in issue No.6 relating to relief that the property was bequeathed by Girdhari Singh under the will Ex.50 and accordingly patta Ex.1 was issued in favour of the plaintiffs and the property was in their possession till it was attached by the City Magistrate under Section 145 Cr.P.C. The learned Judge has referred to the proceedings under Section 145 Cr.P.C and observed that thereunder the Magistrate could attach the property on the likelihood of breach of peace and could direct handing over of possession to the receiver appointed by the Civil Court; and that at present the property was in possession of the Tehsildar, Jodhpur as receiver who was recovering the rent. The learned Judge has thereafter referred to the decisions of the courts dealing with the scope of proceedings under Section 145 and 146 Cr.P.C and observed that the proceedings by the City Magistrate of attachment and decision

thereunder are not binding on the civil court. According to the learned Judge though there was no such issue in the matter but as the property is in possession of receiver, who has later on been continued under the order of the civil court, therefore, this position is being expressed factually.

After and as a result of the discussion aforesaid, the learned Judge has proceeded to decree the suit filed by the plaintiffs granting the reliefs of declaring the property to be of ownership and possession of Oswal Singh Sabha; restraining the defendants by perpetual injunction from interfering with the use and occupation of the property by the plaintiffs; and declaring that the plaintiffs are entitled to recover possession from the receiver, Tehsildar, Jodhpur in accordance with law.

THE APPEAL

Assailing the judgment and decree aforesaid, the defendants have preferred this First Appeal and the findings on the claim of ownership over the suit property and of its possession have been assailed. The defendants-appellants have also contended that the suit was not within limitation. Multifarious arguments have been advanced by Shri Gaj Singh Bhati, arguing for himself and for other appellants,

the plaintiffs with the submissions that the owner of the suit property Girdhari Singh Rajput never executed any such will and all the proceedings in relation and consequent to the will are false, fabricated and non-est. Shri Bhati has also made elaborate submissions on the aspect of possession over the suit property and has particularly relied upon the finding recorded by the civil court in its order dated 20.09.1983 (Ex.A/63) holding that Shri Kishan Singh was in possession of the suit property two months before 23.12.1966 and has submitted that the property was never in possession of the plaintiffs and the documents of rent receipts, rent notes, suits etc. are not conclusive to establish possession of the plaintiffs. The emphasis of Mr. Bhati has also been on the question of limitation with the submissions that the suit filed on 19.12.1978 for declaration, injunction and recovery of possession from receiver, viewed from any angle, is barred by limitation. These submissions and their counter by Mr. L.R.Mehta learned counsel appearing for the plaintiffs have been expanded in detail during the course of arguments. Suffice is to notice for the outline that the following broad points arise for determination in this appeal:

(1) (a) Whether Girdhari Singh bequeathed the part of his property to the body of Oswal community being represented by the plaintiffs; and

(b) Whether the body represented by the plaintiffs acquired title to the suit property?

(2) Whether the body represented by the plaintiffs has been in possession of the suit property from 25.08.1923 till 23.12.1966?

(3) What is the nature of the present suit; and whether the suit is within limitation?

Having given a thoughtful consideration to the submissions made on behalf of the parties and having scanned through the entire record, this Court is clearly of opinion that the present suit deserves to fail for being barred by limitation. Ordinarily on the suit being barred by limitation, consideration of other issues would not have even been necessary but, for the parties having gone to trial on all issues; the present one being a first appeal; and the findings on points No.1 and 2 having bearing on the question of limitation too, it appears appropriate to deal with the above mentioned points ad seriatim.

POINTS NO.1 (a) & 1(b)

It may be pointed out that issue No.1 framed in this case by the trial court is not comprehensive and remains incomplete inasmuch as the question involved in the suit is not only if Girdhari Singh had bequeathed the property to the body represented by the plaintiffs; but the material question is as to whether the plaintiffs are owners of the suit property? Disposition by Girdhari Singh relates only to one part of the property that forms subject matter of suit and parties are ad idem that the property in dispute comprises of portions which were not the part of patta of Girdhari Singh and obviously were not bequeathed. Though it is asserted on the part of the defendants that Kishan Singh and Gulab Bai acquired the additional property; whereas the plaintiffs claim to have purchased the same and having got it included in their comprehensive patta. Coming to this aspect latter, necessary does it appear to clarify that issue No.1 being not comprehensive, necessary questions have been posed as points No.1(a) and (b) herein.

Assailing the claim of ownership of the plaintiffs, Mr.Gaj Singh Bhati has put forward the following objections and contentions:-

(a) that the will (Ex.50) is a forged document; and patta (Ex.1) being based on such forged document is non-est;

(b) that registration of will is of no avail and is illegal too as the document could not have registered without production of original patta; and the original patta was not in possession of the plaintiffs;

(c) that Kishan Singh was adopted son of the owner of the property Girdhari Singh and he alone had the right to the property;

Dilating upon the non-genuineness of the will, Mr.Bhati argued that the owner of the property Girdhari Singh never purchased the stamp; that Girdhari Singh expired on 07.08.1922 and could not have executed the will on 05.07.1923; that the Hindi *miti* (Date) of Ashad Vadi 7 Samvat 1979 does not tally with the date of will of 05.07.1923; that there was no reason or occasion for the stamp to have reached Pratapmal, the scribe of the will; that the purpose is not stated on the stamp and the age of Girdhari Singh has been stated at 65 years but the owner Girdhari Singh had died at the age of about 55 years; that the testator has referred himself as Oswal Girdhari Singh and he was not the owner of property Rajput Girdhari Singh; that as on

03.06.1930 the patta of the property was with Gulab Bai, sister of the owner of the property and, therefore, the assertion of handing over of patta is wrong; that it was Roop Raj Singhvi who brought the will after registration and not the testator Girdhari Singh and that remains an unnatural conduct; that the registration endorsement shows that the owner of the house Girdhari Singh Rajput did not get the document registered; that the document is more suspicious as the stamp vendor, scribe and even the registering authority were all of Oswal community; that there was no reason for the owner of the property Rajput Girdhari Singh to have divested his heirs of normal succession or to have left his sister at the mercy of the persons of other community; that the beneficiary stated in the will was 'Singh Sabha' and not 'Oswal Singh Sabha' that was not even existing at the time of the alleged will and the present Oswal Singh Sabha is not the successor of said Singh Sabha, the alleged legatee. It has also been contended that the patta of the property was not handed over and was never produced and, therefore, the will could not have been registered at all; and that Kishan Singh was adopted son of Girdhari Singh and he continued to remain owner of the property after Girdhari Singh and that the will was never produced earlier and it has seen the light of day only on

30.08.1967 and nobody has explained as to where the will was for all these years and why was it not produced earlier?

Mr.Mehta learned counsel for the plaintiffs-respondents has referred to the oral evidence led by the plaintiffs proving the signatures and initials of the testator late Shri Girdhari Singh on the will Ex.50 and has also referred to the evidence regarding hand-writing and signatures of the scribe and the attesting witnesses. Mr.Mehta has also pointed out that the will executed by Girdhari Singh in favour of Jawana and so also the will executed by Smt.Gulab Bai in favour of Jain school refer to the fact that Girdhari Singh bequeathed the property to Oswal school. Learned counsel further submitted that the affidavit of Pratapmal Ex.A/27 and that of Farjanlal grand son of Chandmal Ex.A/42 corroborate the will and parentage of Girdhari Singh. The emphasis of the learned counsel Mr.Mehta has been that the registration of the will dated 05.07.1923 rules out any mistake either in respect of identity of the testator or the property mentioned therein and the finding recorded by the trial court calls for no interference. Learned counsel has also submitted that the argument about the validity of the registration of the will for want of patta in question is of no avail inasmuch as the provision in Marwar Patta Ordinance, 1921 regarding production of patta was introduced in the year 1933 and, therefore, has

no application to the will dated 05.07.1923. It has been submitted that Section 8(1) of Marwar Patta Ordinance was amended vide C.R.No.2 dated 02.07.1933.

Mr.Mehta has further contended that the patta having been issued in favour of Oswal Singh Sabha and the same having not been challenged, the defendants are not entitled to question the title of the plaintiffs. The contentions about the identity of the testator and his caste have also been refuted with reference to the evidence available on record. It has also been urged that the factum of adoption of Kishan Singh by late Shri Girdhari Singh has not been established on record nor such adoption could be recognized for want of registration as per the notification dated 11.04.1914 of the State of Marwar.

Having given a thoughtful consideration to the rival contentions and having examined the material produced on record, this Court is of opinion that though some doubts have of course been created by the defendants in this case against the claim of ownership of the plaintiffs but the defendants have failed to establish by cogent evidence that the registered will Ex. 50 is a forged document. Then, the fundamental fact remains that the patta Ex.1 was nevertheless issued by the Development Department in favour of Singh Sabha of Oswal community of Jodhpur in relation to the

property in dispute on the basis of an application moved on 29.11.1923 recognizing that Girdhari Singh had bequeathed the property under the registered will dated 05.07.1923.

The date of death of Girdhari Singh has been asserted by the defendants to be 07.08.1922 but there is not an iota of evidence on record to establish such claim about date of death of Girdhari Singh. The defendants have relied upon the fact that the date of death of Girdhari Singh was not known to the plaintiffs and they stated initially the date as 25.07.1923 and then changed it to 25.08.1923. The fact that date of death was so changed in the proceedings before the Magistrate is not in dispute but is hardly of any consequence. Once the defendants have failed to establish that testator had expired before the date of will; and the will has otherwise been duly recognised, mere wrong mentioning of date of death of 25.07.1923 initially would not by itself lead to a conclusion that the will was a forgery. Extensive submissions have been made in relation to the reference of the caste of Girdhari Singh as Oswal in the will Ex.50. The defendants have only suggested a different parentage of Girdhari Singh and Gulab Bai but there is no such proof available on record in respect of such parentage as alleged and suggested by the defendants. On the contrary, an affidavit of Farjanlal grand son of Chandmal dated 09.01.1967 (Ex.A/42) as filed by the

defendants lends support to the plaintiffs on their assertion of facts about the parentage of Girdhari Singh.

The propounder of will having taken part in execution and registration of the will is definitely a circumstance that require closer scrutiny of the matter; but having regard to the fact that as per the will the testator intended to gift his property by way of bequest to a body of persons of a community for the purpose of boarding house, the fact that the persons related with the community took part in such execution cannot be regarded as absolutely an unnatural conduct.

Nomenclature of the body represented by the plaintiffs and the body in whose favour bequest was made has been strenuously put into arguments with the submissions that Oswal Singh Sabha was not even in existence in the year 1923. These submissions too cannot take away the validity of the will and the rights flowing therefrom. By way of the will in question, bequest has been made in favour of Singh Sabha for the purpose of constructing a boarding house with stipulation that if boarding is not established then its income may be spent for Sardar School or Oswal Jain Kanya Pathshala, as deemed proper by Singh Sabha. It has not been established on record that such ‘Singh Sabha’ as referred by the testator was a separate body of Rajputs as alleged in the written

statement. Then, it is also not proved by the defendants that such Singh Sabha, if at all a body different than Oswal Singh Sabha, had anything to do with Sardar School or Oswal Jain Kanya Pathshala as mentioned in the will. The defendants have failed to establish that the beneficiary under the will is not the Singh Sabha of Oswal community in whose favour ultimately patta Ex. 1 was granted by the competent authority.

Other suspicious circumstances sought to be relied upon by the defendants against the will are also not of much substance. So far the alleged incongruity about the date and Hindi miti on the will are concerned, firstly in a duly registered document such objection is not of any help; and secondly, from the equivalent dates given in 100 Years' Indian Calendar by Jagjivan Ganeshji Jethabhai for A.D. years 1845 to 1944, it appears that the Gregorian calendar date of 05.07.1923 is referable to Vadi 7 of Ashad in Hindi and Punjabi areas. Of course, it refers to samvat year 1980; and that does create some doubt but a close look at other surrounding circumstances quells such doubts. Another will executed by Girdhari Singh in favour of Jawana for a piece of land admeasuring 7 yards x 30½ yards has been placed on record as Ex. 150. It refers to the bequest already made in favour of "Sardar School"; and this will favour of Jawana bears the date of execution only in Hindi miti at Shrawan Vad 10 of

Samvat 1980, Tuesday. It was presented for registration on English Calendar date of 10.08.1923. Reference to the same 100 years' Indian Calendar makes out that on Shrawn Vad 10 of Samvat 1980 it was Tuesday; and the date was 7th August of the year 1923 A.D. So, in the document executed in the month of Ashad (Ex.50 dated 05.07.1923) Samvat year was stated at 1979 whereas in the document executed the next month of Shrawn (Ex. 150 dated 07.08.1923) Samvat year was stated at 1980. It only indicates that change of Samvat year from the month of Shrawn was adopted; and change of year from different months in different areas is not unknown. Having examined the original will Ex. 50, this court is satisfied that its execution date of 05.07.1923 does not appear doubtful. Other objections about inconsistency in the age of the Girdhari Singh or about the purchase endorsement on the stamp are more of formal nature rather than of substance. It has rightly been contended on behalf of the plaintiffs that due registration of the will removes any doubt about the identity of the testator.

The owner of the property Girdhari Singh not bequeathing the property to his sister or leaving her at the maintenance allowance by the legatees does also not lead to a definite conclusion that something is seriously amiss about the will for which it could held to be a forged document. Then,

the fact remains that bequest by Girdhari Singh has been referred at more than one place and most significantly, in the disposition of her property by Gulab Bai too (Ex. 53). By the aforesaid will Ex. 53 Gulab Bai not only referred to the fact of bequest by Girdhari Singh but proceeded to donate her properties also to Jain School.

So far the requirement of patta for the purpose of registration of will is concerned, it has rightly been pointed out on behalf of the plaintiffs that such requirement regarding production of patta was introduced in the year 1933 in the Marwar Patta Ordinance, 1921 and shall, therefore, have no application to the will dated 05.07.1923.

It has been strenuously contended that the original patta never came in possession of the alleged legatees and in fact, patta was with Gulab Bai who produced the same with her application for construction permission made on 03.06.1930. Even if it be assumed that the original patta remained with Gulab Bai that by itself does not operate against the validity of the will. On the contrary, as noticed above, Gulab Bai herself in her disposition referred to the fact that Girdhari Singh bequeathed the property to oswal school. The said application of Gulab Bai Ex.A/115 (at page C-102/220) on its heading shows that it was dealt with in a file pertaining to bequeath of property by Girdhari Singh to Sardar

School of Singh Sabha. The fact that Girdhari Singh did execute the will in favour of the body of oswal community is corroborated by every relevant piece of evidence and the contentions against the same remain rather hollow. The defendants have also raised question that the will was never produced before the year 1966. This contention is hardly of any relevance. Once it is evident that the patta was issued by the competent authority on the basis of this will, there was obviously never any requirement of production of the will before the defendants threw challenge to the title of the plaintiffs.

On the question regarding adoption of Kishan Singh by Girdhari Singh insofar it is relates to the claim of ownership, suffice is to notice that even such adoption has not been established on record by cogent evidence. Though the requirement of registration of adoption in the State of Marwar as made applicable by the notification dated 11.04.1914 would not apply to the facts of the case where such adoption has been alleged to have taken place at Ajmer but then, the very fundamental fact of adoption is not borne out from any evidence on record. Admittedly, DW-1 Gaj Singh was not born at the relevant time and the witness DW-2 produced by the defendants has also deposed only to the extent of a remote hearsay and nothing else. There is no reliable

documentary evidence wherefrom the crucial fact of adoption of Kishan Singh by the owner of the suit property Girdhari Singh could be accepted. It may be noticed that there is no other documentary evidence on record by which Kishan Singh having dealt with the property as an owner thereof could be deduced. On the contrary, the application of Gulab Bai relied upon by the defendants (Ex.A/115) rather operates against the case of the defendants qua Kishan Singh. If Kishan Singh was there as an adopted son of Girdhari Singh, in the ordinary course of things, such application for construction permission would have been made by Kishan Singh and not by Gulab Bai. The defendant has attempted to suggest in his deposition as if the said application was of Kishan Singh; but such suggestion stands contrary to the documents.

Even otherwise, if for the sake of arguments adoption of Kishan Singh be assumed, that would be of no impact or effect inasmuch as once the execution of the will is accepted, the alleged heir cannot claim normal succession when the same has been cut off by the will of the owner of the property.

There are of course some loopholes in the case of the plaintiffs and it is rather inexplicable as to how on an application made on 29.11.1923 a file was opened only in the year 1939-40; and as to how a construction permission was

accorded to Singh Sabha on 24.02.1940 (Ex.49) treating the land in question to be 'pattasud land of Singh Sabha' when the patta itself was granted only on 09.11.1945?

However, on such suspicions, or strong doubts for that matter, the ownership grant emanating from patta Ex.1 cannot be ignored; and the patta having been issued by the competent authority, the claim of ownership of the plaintiffs on its basis cannot be denied. The said will dated 05.07.1923 has never been put to challenge in any properly constituted proceedings and there remains presumption about valid execution of a registered document and of its prima facie validity in law. The onus of proof, therefore, against the registered document to rebut the presumption had been heavy on the defendants; and, as noticed above, by way of evidence and submissions what the defendants have created are mere suspicions and they are not of such proof that could conclusively dislodge the presumption.

This Court is of opinion that mere creation of suspicion cannot partake the character of cogent proof to dislodge the presumption arising out of a registered document and then, there is no reason to discard the document of title i.e., the patta issued by the competent authority. It is also noteworthy that the patta dated 09.11.1945 (Ex.1) comprises not only the property bequeathed by Girdhari Singh but

includes additional part of the land towards main road (distinctly mentioned in patta) measuring about 146.3 sq. yards. It has been argued by the appellant that the additional land was also the property acquired by Kishan Singh and Gulab Bai however such suggestion too is not supported by any cogent evidence and cannot be countenanced. There appears no reason to disbelieve the case of the plaintiffs so far their title to the property is concerned. The findings on issue No.1, therefore, cannot be said to be perverse or illegal and call for no interference. On point No. 1, in both its parts, the finding of the trial court is affirmed and it is held that Girdhari Singh bequeathed his property under the will Ex. 50 and the body represented by the plaintiffs acquired title to the entire property comprised in patta Ex. 1, that includes the property received from Girdhari Singh and so also the additional part of the property purchased by them.

POINT NO.2

In this case, the learned trial court framed issue No.2 on question as to whether Oswal Singh Sabha was continuously in possession of the suit property from 25.08.1923 (the alleged date of death of Girdhari Singh) to 23.12.1966 (the date of attachment)?

This Court is of opinion that in the frame of this suit, issue No.2 in its present form does also not bring about the

real question in controversy. As shall be seen in point No.3, the present one is not even a suit for recovery of possession; and essentially it remains a suit for declaration and consequential injunction; and in view of the nature of the suit the only question is as to when right to sue accrued to the plaintiffs? However, coming to this aspect latter, it may be examined as to whether the plaintiffs have been able to establish their possession on the suit property?

It has been strenuously contended on behalf of the plaintiffs that in view of overwhelming evidence produced on record including the rent deed of Magraj dated 10.07.1946 (Ex.45), rent deed of Railway Controller J.A.Ffolliot dated 11.07.1946 (Ex.158), other rent deeds dated 12.07.1946 (Ex.34, 35, 36 and 44) and dated 01.08.1946 (Ex.37) and so on; various rent receipts; various suits filed against the tenants, decrees obtained therein and execution levied; and various other acts in furtherance of their rights as owners of the property, the plaintiffs have been able to establish their possession till the date of taking over of the property by the magistrate; and that there remains a presumption about possession of the plaintiffs in continuous length of time both backwards and forwards. Mr.Gaj Singh Bhati on the other hand submitted that the plaintiffs have failed to show their possession on any part of the property and mere

creation of rent notes or even filing of baseless suits would not be decisive of their possession. It has also been argued by the appellant that upon a reference made by the City Magistrate, the civil court after enquiry returned its finding on 23.09.1983 (Ex.A/63) and found, after dealing with status of each and every apartment in the property, that Kishan Singh was in possession of the entire property. It has been maintained by Mr.Gaj Singh Bhati that such finding ought to be treated as res judicata and that is conclusive of the fact that plaintiffs were not in possession of the property. It has also been argued that the plaintiffs have not produced any of their alleged tenant and have failed to show as to which part of the property they were in possession of?

It has already been noticed that in issue No. 2 the learned trial Judge has accepted the possession of the plaintiffs particularly in view of the fact that the patta had been issued in their favour; construction permission had also been issued; they had raised construction, expenditure whereof was entered in their books; and they had let out the premises from time to time and filed the suits and took steps to recover rent and possession.

Of the witnesses produced by the plaintiffs, PW-1 Jethmal has of course not let out any property himself but deposing as one of the members of executive of Oswal

Singh Sabha has referred to the decrees made in their favour and has exhibited various rent notes. PW-4 Basant Raj is the witness testifying to the hand-writing of his father, who was working as clerk with Oswal Singh Sabha, on certain documents and accounts books; and similar is the position of PW-5 Dhanraj Tatia and of PW-6 Bheruraj Bhandari.PW-7 Dhanpat Raj Singhvi is the son of Mohanraj and has testified to the hand-writing of his father on the documents related with him. Similarly, PW-8 Parbatmal Bhandari has testified in relation to the hand-writing of his father and his brother on some of the rent notes.

PW-10 Ujasmal son of Prakashmal has established hand-writing of his father on the documents Ex.461 and 472 and then has stated that rent note Ex.277 was in his own hand-writing. In cross-examination he has stated that the said rent note was scribed by him at the asking of Nathu Singh but after looking at the document has said that signatures of Nathu Singh were not legible on the same. PW-12 Yogesh Chandra Trivedi has again deposed about hand-writing of his father Lalchand on the rent notes and accounts books.

PW-14 S.L.Tanwar, the Asstt.Engineer of Public Health Engineering Department has deposed about the water connection at consumer No.7047 though he was unable to

state the place where this particular connection was existing in the building and has deposed that the building of Oswal Sabha Bhawan was occupied by various persons and there were likely to be 3-4 more consumer connections.

PW-15 Ramjeevan Maheshwari has deposed that house in which he was residing was of ownership of his material uncle Madanlal Maheshwari; and Madanlal got this house from Javana and has pointed out about the vacant land between two buildings and of the dispute between Javana Patel and Oswal Singh Sabha on the basis of some facts divulged to him by his maternal grand father and has stated that there was no rent note of the house in which he was residing and that Madanlal was dumb and unable to speak. Statements of this witness are of course of uncertain nature.

PW-13 Govind Singh deposed as ex-Chief Trustee of Oswal Singh Sabha and his statement was deferred on 23.01.1989 with his cross-examination remaining incomplete and it is borne out from the record that he expired on 28.01.1989 and hence his statement was never completed. The statements of witness PW-13 are also, therefore, required to be removed out of consideration.

However, one witness Jyoti Kvatra, PW-16 has been produced by the plaintiffs as their tenant in the property.

He has stated his age at 37 years and that his firm in the name of J.K. & Company was tenant in a shop on the property of Oswal Singh Sabha for the last 30-35 years. He has referred to the receipts Ex.386, Ex.436, Ex.448, Ex.447, Ex.272, Ex.170 and Ex.220 bearing signatures of the manager of their firm Satpal and has deposed that property was taken on rent from Oswal Singh Sabha. He has admitted that shop was taken on rent by his father who had expired on 09.01.1977 and that he became partner in the firm J.K. & Company only in the year 1973-1974. He has also admitted that none of the receipts were drawn in his presence and that he had never made any payment of rent to Oswal Singh Sabha and that he was deposing only on the basis of receipts that shop was of Oswal Singh Sabha.

The overall evidence on record related to the rent notes, rent receipts and the suits filed by the plaintiffs and the decrees obtained against the tenants does show that the property was dealt with by them as rightful owners. It is difficult to countenance the submissions of the defendants that all the rent notes and rent receipts relied by the plaintiffs are fake or fabricated and that all the suit proceedings were bogus.

It has been suggested on behalf of defendants that Kanmal who filed the suits against the tenants was in fact an employee of Kishan Singh and he was supposed to file the

suits in the name of Kishan Singh but he deceived and then was removed from services. The suggestions so made seem to be far-stretched and do not inspire confidence. Scores of suits were filed and decrees were obtained. If Kishan Singh was deceived in this manner by his alleged employee, it remains inexplicable as to why Kishan Singh chose not to adopt suitable proceedings?

It has been repeatedly stressed during the course of submissions by the appellant that the plaintiffs have not produced any tenant in support of their case. The argument is not convincing. So far the tenants are concerned, in view of the nature of dispute between two parties stacking claim to the property, ordinarily, they cannot be expected to get themselves involved in title dispute. Yet the plaintiffs have produced one witness PW-16 Jyoti Kavatra who has testified as partner of a firm admitting being the tenant of the plaintiff since the time of his father. There appears no reason to discard the testimony of the said witness. Then, the defendants have also not been able to produce any other evidence by which it could be concluded that Kishan Singh was in possession of the suit property and used it as rightful owner since after the death of Girdhari Singh. Mere extending receipts to the tenant from the years 1964-1965 could hardly be taken as proof of possession of the defendants.

Apart from the evidence in the form of dealings with the tenants by the plaintiffs as owners of the property, there are other facts and circumstances available on record that show the plaintiffs having been in possession of the property. Patta Ex.1 granted in the year 1945 itself establishes that the competent authority was clear after due enquiry and measurements that the plaintiffs, and nobody else, was entitled to the ownership of the property that was being granted under patta inclusive of the property bequeathed by Girhdari Singh and so also additional piece of land purchased by the plaintiffs. If anybody else had the right of possession, such ownership grant could not have been made.

Then, there is a significant piece of evidence available on record in the form of a litigation between Sugani and Singh Sabha that commenced in the year 1931 and was decided on 13.07.1936 (Ex.156 and Ex.157). This litigation clearly shows that there was a dispute between the widow of Jawana and Secretary of Singh Sabha about the rights on a piece of land lying between the property given to Jawana and to Singh Sabha by Girdhari Singh. It cannot be accepted that even such litigation and decision by the

competent court were also in an attempt to create false evidence.

From the evidence on record what appears is that the plaintiffs were continuously in possession of the suit property and never lost such possession though their rights in the property came under serious threat when the defendants staked claim to the property and some of the tenants also sided with them.

Mr.Gaj Singh Bhati has strenuously relied upon the decision Ex.A/63, claiming it to be res judicata for the purpose of submissions that the plaintiffs having lost possession two months prior to the date of attachment remains a finding concluded under the said decision. The submissions are not well founded. A decision in proceedings under Section 145 Cr.P.C. even if made by the civil court on a reference under the then existing provisions of Section 146 Cr.P.C., the same are hardly decisive for the purpose of the civil suit and could least be treated as res judicata. Having regard to the evidence produced on record, the finding on issue No.2 appears to be calling for no interference. However, that is not the end of the matter.

The fact that the plaintiffs' rights in the property were consciously put to threat by the defendants is more than apparent on record. Even if all other aspects are left aside, it is clear, and rather undeniable, that from the years 1964-65 the defendants did definitely and clearly challenge the rights of the plaintiffs with open assertion of their rights in the property; and the tenants stopped making payment of rent. By the written communication dated 29.12.1965 the defendant Gaj Singh Bhati specifically warned the Chief Trustee of Oswal Singh Sabha and Shri Mohan Raj Singhvi that they should not attempt entering in Girdhari Singh's Haveli and that no person of Oswal community would be permitted to enter in the building and that they have got no right to the property. That aforesaid was not a mere threat and it was put into effect is borne out from the application made by Munim Mohanlal to the City Magistrate on 09.01.1966 (Ex.A/134) . Mohanlal stated in the said application, inter alia, thus:

> "आज ता0 9-1-66 को सुबह 10 बजे सायल, रतनलालजी मेहरा ओवरसियर,केलाशमलजी भण्डारी, मिसरीमल पटवा और मंगलचन्दजी सिगवीं के साथ गिरधारीसिंह जी के नौहरे में नाप करवाने व इमारत किस प्रकार बने इस सम्बंध में रतनलालजी को सुझाव देने के लिए पहुंचे परंन्तु जुमले गैरसायलान गिरधारीसिंह जी के नोहरे के बाहिर खड़े मिले व आमदा फिसाद थे। उन्होंने सायल, ओवरसियर और उपरोक्त अन्य शख्सों को नोहरे में दाखिल तक नहीं होने दिया मारपी की धमकियां देने लगे व धक्के दिये और नुकस अमन का सख्त अंदेशा पैदा हो गया। यदि सायल एक उनके साथ

वाले आमोश नहीं रहते तो बड़ी भारी फिसाद व झगड़ा हो जाता । गैरसायल को इस प्रकार सायल व अन्य शख्सों को नोहरे दाखिल होने से रोकने का कोई अधिकार नहीं है. स्कूल बनाने के सिल सिले में आयन्दा भी हर समय आना जाना जरूरी होगा व गैरसायलान हर समय आमदा फिसाद होकर नुक्से अमन की सूरत पैदा करेंगे जिससे सायल व अन्य शख्सों के जान का खतरा बना हुआ रहेगा।"

In his statement dated 10.01.1966 Mohanlal had stated that the tenants were continuing in possession from the time of Girdhari Singh and he was recovering the rent from the year 1960; that there were 19 tenants in the property and 20 apartments were lying vacant. It was stated, inter alia that,-

"इन 19 किराये दारों में से 16 किरायेदारों ने दो साल से किराया देना बन्द कर रक्खा है और इस कारण से हमने इन पर दीवानी दावे एडिसनल मुन्सिफ मेजिस्ट्रेट कोर्ट नं: 1 में कर रक्खें है। इन में से 8 मुकदमों का फैसला हमारे पक्ष में हो चुका है व बाकी 8 दावे अभी तक अदालत में चल रहे हैं। इन दावों की वजह से ही ये किरायेदार लोग मेरे से नाराज है। और जब भी मैं वहां जाता हूँ ये लोग मिटिन्ग कर मुझे बुरा भला कहते है और मारने की धमकियाँ देते रहते है इन 16 किरायेदारों ने बाकी के 3 किरायादारों को किराया हमने न देने के बाबत अपनी मिन्टिग में कहा लेकिन वे लोग इनके बहकावे में नहीं आये और कहा कि हम तो किराये पर रहते है इसलिए किराया जरूर देनगे।"

It has also been stated that upon his reaching on 09.01.1966 he was abused and was prevented from entry thus:

"पोल के अन्दर दाखिल होते ही 8 आदमी, दो औरते व करीब 20-25 लडके मेरे चारों तरफ हो गये और मुझे

कहा कि आप अन्दर नहीं आ सकते । यह कोई आम रास्ता नहीं है। कोई मुझे कुछ कहता और कोई कुछ यानि वे लोग मुझे मनआये ज्योही गालिया दे रहे थे। मैंने कहा कि हमारा नोहरा में अन्दर आ सकता है लेकिन इस पर भी इन लोगों ने मुझे अन्दर नहीं जाने दिया और कहा कि अगर आगे बढे तो जान से मार दिये जाओगे और बुरी तरह गालियां दी । अगर मैं आगे बढता तो मुझे अन्देशा था कि वे लोग मुझे जान से मार देते।"

Same are the contents of his statement Ex.A/137. The threats were further substantially repeated in unequivocal terms by the defendant Gaj Singh Bhati in his letter dated 25.04.1966 (Ex.A/373) wherein he denied the title of Oswal Singh Sabha, asserted the will to be a forgery and stated that plaintiffs would not be permitted to enter the premises. This letter was sent by registered post as is borne out from the postal receipts Ex.A/374 and A/375. To quote another example that threats to the plaintiffs were not innocuous, the written statement of a tenant Hukam Singh Ex.A/154 could be referred wherein he denied any relationship of Oswal Education Fund Singh Sabha with the building of Girdhari Singh thus:

"कि पैरा नं0 2 अ0दा0 मनधडन्त व झुठ है। न तो गिरधारीसिंह जी के बिल्डीग का ओसवाल एजूकेशन फन्ड सिंह सभा से कोई तालुक है और न यह सभा इसका केई कार्य कर सकती है। या किराया वसूल कर सकती है। यह सभा जबरन मालिक बनने की झुठी कोशीश कर रही है।"

It has also been asserted in the said written statement that relatives of Girdhari Singh were available and without impleading them, suit could not be filed.

Though it has been argued on behalf of the appellants that the finding in the order dated 20.09.1983 be treated res judicata and as a consequence thereof, when it is found that plaintiffs were not in possession two months prior to 23.12.1966, the present suit be treated as time barred with reference to the limitation of 12 years; and such submissions of the appellants have no force for the reason that neither such findings are res judicata nor the period after the date of attachment, i.e. 23.12.1966 would have been counted towards limitation if it were a suit for possession; but even when such findings are not taken res judicata, the proceedings do have a bearing to the extent that unequivocal threat to the rights of the plaintiffs were made that led to attachment of the property.

Thus whatever were the rights professed by the plaintiffs in the suit property such rights unequivocally came to be challenged at least on 29.12.1965 when open threat was extended; and on 09.01.1966 when they were prevented from entering into the property and on subsequent occasions, when defendants asserted themselves as owner of the

property and so also when the tenants denied the rights of the plaintiffs.

POINT NO.3

It may be pointed out at the outset that the question as to whether the suit is within limitation is essentially dependant upon the nature of this suit and hence the question herein has been formulated in two parts.

The question as to whether the suit is within limitation has been addressed to and answered by the learned trial court only with the observations that the City Magistrate attached the property on 23.12.1966 and the suit was filed on 19.12.1978, hence it was filed within 12 years and, therefore, issue No.4 was required to be decided in favour of the plaintiffs. Having examined the matter in its totality, this Court is of opinion that vexed question of limitation in this case cannot be decided merely with reference to the period of 12 years from the alleged date of accrual of cause of action as stated by the plaintiffs.

In the first place, it is required to be noticed that mere passing of an order of attachment does not furnish any cause of action and, if merely the attachment of property is taken to be the cause for filing the suit, it would practically be rendered bereft of cause of action! In the special bench decision in

Pappy Amma Vs. Prabhakaran Nair: AIR 1972 Kerala 1 relied upon by the plaintiff-respondents, it has been pointed out that the court when it takes possession through its agent does not commit any wrong and its action in taking possession can never furnish a cause of action to any of the parties to file the suit to recover the possession from the receiver. The learned Judge has obviously been in error in simply referring to the date of attachment and then the date of filing of suit and concluding that the suit is within limitation having been filed within 12 years of attachment.

It has, however, been strenuously contended on behalf of the plaintiff-respondents that to the suit at hands, Article 65 of the Limitation Act, 1963 shall apply. Mr.Mehta learned counsel for the respondents submitted that Article 64 of the Limitation Act 1963 is restricted to the suits for possession of dispossession or discontinuance of possession and in order to bring a suit within purview of Article 64, it must be shown that the suit in substance is based on the allegations of the plaintiffs having been in possession and having subsequently lost the possession either by way of dispossession or discontinuance of possession. The emphasis of Mr.Mehta has been that Article 65 of the Limitation Act, 1963 is residuary article applying to all other kinds of suit for possession except those covered under Article 64; that Article 65 of the Limitation

Act 1963 covers various Articles of the old Limitation Act, 1908 including Articles 144 and 47; and that the present suit based on the plaintiffs' title in which there is no allegation of prior possession and subsequent dispossession could only fall under Article 65. According to Mr. Mehta, the plaintiffs' suit for possession and injunction is founded on title and is, therefore, governed by Article 65 and it is not necessary for them to show that they have been in possession of the suit property within 12 years of the date of filing of the suit i.e. 19.12.1978. Learned counsel Mr.Mehta has relied upon the decisions in Goswami Ranchor Lalji Vs. Girdhariji: ILR (1897)20 Allahabad 120; Sarat Chandra Maiti and others Vs. Bibhabati Devi and others: AIR 1921 Calcutta 584; Pappy Amma Vs. Prabhakaran Nair: AIR 1972 Kerala 1; Gangadhar Behera and others Vs. Surendra Barik and others: AIR 2003 NOC 322 (Orissa); Ramaiah Vs. N.Narayana Reddy (Dead) by L.Rs: AIR 2004 SC 4261; and Saroop Singh Vs. Banto and others: (2005) 8 SCC 330.

The case of Sarat Chandara (supra), the Hon'ble Calcutta High Court relying on its previous decisions that when property is attached under Section 146 Code of Criminal Procedure it passes into legal custody and during continuance of the attachment such custody is for the benefit of true owner said, -

> "If the true owner was in fact in possession when the attachment was effected, his possession in the eye of the law is not interrupted. **If, on the other hand, the wrong–doer was in possession at the time when the attachment took place, the effect of the attachment is to interrupt his possession and from the moment of attachment the possession of the rightful owner revived in the eye of the law.**
>
> (emphasis supplied)

In the case of P. Amma (supra), the Hon'ble Kerala High Court observed thus:-

> "The court is not presumed to do any wrong to any of the parties to a suit by taking possession of a property by a receiver, its agent. 'Dispossession' in Art. 142 implies taking possession without the consent of the person in possession and is a wrong to the person in possession. It furnishes a cause of action to the person who was in possession to recover possession from the person dispossessing. On the other hand, as already stated, **the court, when it takes possession through its agent, does not commit any wrong to any of the parties to the suit, and its action in taking possession can never furnish a cause of action** to any of the parties to file a suit to recover possession from the receiver. The property simply passes into custodia legis."
>
> (emphasis supplied)

In the case of Gahgadhar Behera (supra) reported as notes of cases (NOC), the facts of the case are not available but apparently the Hon'ble Orissa High Court

was also dealing with a suit for declaration of title and for recovery of possession as referred in first paragraph of the report, though in second paragraph the phrase 'the suit for declaration' appears. However, the said NOC deals with applicability of Article 65 of the Limitation Act, obviously qua a suit for possession and it has been held that after declaration of possession under Section 145 Cr.P.C., in the event of unsuccessful party filed a suit for declaration of title and for recovery of possession and he succeeded in getting his title declared by the competent Court over the suit properties, the possession during the course of 145 proceeding shall also enure to his benefit.

In the case of Ramaiah (supra) before the Hon'ble Supreme Court, the facts of the case were that one Bayyanna, owner of the suit land admeasuring 3 acres and 12 gunthas sold it under registered sale deed dated 04.11.1958 to N. Narayana Reddy; and the said purchaser instituted suit No. 357/1960 for recovery of possession against the appellant on the ground that the appellant was trying to interfere with his possession. The suit was defended on the assertion by the appellant that he had purchased the land on 27.11.1959 from Bayyana and that he was in possession; and further that the suit land was Inam land and he was registered as tenant by Inam Abolition Authorities. The trial court partly decreed the

suit holding Narayana Reddy owner of 1 acres 21 gunthas of land; however, he was found to be in possession of entire 3 acres 12 gunthas and, therefore, permanent injunction was granted against the appellant from interfering with his possession with liberty to the appellant to take steps to recover possession of the part of land by following due process of law because it was held that 1 acres 21 gunthas was re-granted by the Deputy Commissioner to the appellant. The said judgment and decree attained finality upon successive appeals having been dismissed; last one on 24.11.1982. The appellant before the Hon'ble Supreme Court then filed the suit in question within 2 years of decision of second appeal relating to the earlier suit for possession of land admeasuring 1 acres 21 gunthas. The trial court dismissed the suit on the consideration that the appellant admittedly stood ousted in 1971 and the suit was barred by limitation. The Hon'ble Karnataka High Court also endorsed the view of the trial court and rejected the contention of the appellant that the period of limitation commenced only after decision by the High Court of the earlier second appeal on 24.11.1982. It was contended before the Hon'ble Supreme Court on behalf of the appellant that he had instituted the suit for possession based on title and not on the basis of previous possession and, therefore, under Article 65 of the Limitation Act, the suit was well within time;

because limitation of 12 years commenced from the date when possession of the defendant became adverse to the appellant; benefit of Section 14 of the Limitation Act 1963 was also invoked. Rejecting the contentions, the Hon'ble Supreme Court said that Article 64 of the Limitation Act is restricted to the suits for possession on dispossession or discontinuance of possession; and in order to bring a suit within the purview of that Article, it must be shown that the suit is in terms and substance based on allegation of the plaintiff having been in possession and having subsequently lost the possession. The Hon'ble Apex Court then observed that Article 65 of the Limitation Act is the residuary Article applying to the suits of possession not otherwise provided for; that the suits based on plaintiff's title in which there is no allegation of previous possession and subsequent dispossession alone can fall within Article 65; and that the question whether Article 65 is applicable has to be decided with reference to the pleadings. On facts, the Hon'ble Supreme Court found that in the earlier suit, the appellant had admitted that he was in possession of the suit property upto 1971 and this admission was taken indicative of ouster from possession; though in the suit at hands, the appellant has glossed over this fact. The suit instituted on 08.05.1984 was held barred by limitation and the

appellant was held disentitled for benefit of Section 14.The Hon'ble Supreme Court said,

> "Suits based on plaintiffs' title in which there is no allegation of prior possession and subsequent dispossession alone can fall within article 65. The question whether the article of limitation applicable to a particular suit is article 64 or article 65 has to be decided by reference to pleadings. The plaintiff cannot invoke article 65 by suppressing material facts."

The Hon'ble Supreme Court further observed,-

> "In the commentary on the Limitation Act by Sanjiva Row [Ninth Edition – IInd Volume page 549] it has been stated that the question as to which of the two articles would apply to a particular case should be decided by reference to pleadings, though the plaintiff cannot be allowed by skilful pleading to avoid the inconvenient article."

In the case of Saroop Singh (supra), interpreting the operation of Article 65 of the Limitation Act, 1963 in a suit for possession and permanent injunction, the Hon'ble Supreme Court held that in terms of Article 65, the starting point of limitation does not commence from the date when the right of ownership arises but commences from the date the defendant's possession becomes adverse. In the said case, Indira Devi widow of one Shadi having inherited the suit property donated the same on or about 07.01.1955 by a deed of gift in favour of the appellant. One Harnama filed the suit No. 204/1957 challenging the legality of the said deed of gift

contending that Indira Devi had a limited life interest. In terms of judgment and decree dated 31.01.1958, the suit was decreed and the gift deed was held to be valid only so long as Indira Devi was alive. In the year 1994, the plaintiff-respondent filed the suit for possession and permanent injunction against the defendant-appellant. The plaintiff alleged that Indira Devi having not been heard for last seven years was presumed to be dead. It was alleged by the defendant that the suit was time barred. The trial court on the basis of decree of the previous suit upheld the claim of the plaintiff-respondent and noting that the defendant had not set-up the plea of adverse possession, held that the suit was within limitation. The Hon'ble Supreme Court on such facts considered that the plaintiffs have proved their title and it was for the first defendant to prove acquisition of title by adverse possession; and having not raised any plea of adverse possession, the suit was not barred by time.

In the case of Goswami Ranchor Lalji (supra) again, the suit was filed on 07.09.1893 for recovery of possession. Disputes having arisen between the parties, the Magistrate had taken proceedings and being unable to satisfy himself about which of the parties was in possession made order of attachment under Section 146 Cr.P.C. on 13.09.1887. The first appellate court dismissed the suit as barred by

limitation on the ground that the Government having not been made a party, the suit would only be deemed to be one for a declaratory decree. It was conceded before the Hon'ble Allahabad High Court that the view of the court below was erroneous on this point. The case was essentially dealt on the question of applicability of Article 47 of the Indian Limitation Act, 1877; and it was held that Article 47 would not apply and the applicable Article is either 142 or 144. It has of course been observed that applicability of law of limitation depends upon the frame of suit as brought, and not upon the form in which it should have been instituted.

Ratio of Goswami Ranchor Lalji (supra) in relation to applicability of Article 142 or 144 was considered and not agreed to by the Hon'ble Madras High Court in the case of Rajah of Venkatagiri Vs. Isakapalli Subbiah & Ors.: (1902) 26 Madras 411 and it was held that the actual physical possession being with the Magistrate who was not and could not be made a party to the suit, the Magistrate could not be regarded as having dispossessed either party nor could either party be regarded as having discontinued possession. For the purpose of limitation, seisin of legal possession was, during the attachment, in the true owner. Article 144 was held less applicable because each plaintiff claimed as true owner. The said suit was held essentially for declaration of title covered by

the period of limitation of 6 years as prescribed by Article 120 of Second Schedule to the Limitation Act.

In the case of Panna Lal Biswas Vs. Panchu Ruidas & Ors.: AIR 1922 Calcutta 419, again, while dealing with a suit where possession of the disputed property was with a Magistrate, the Hon'ble Calcutta High Court noticed the decisions in Goswami Ranchor Lalji and so also in Rajah of Venkatagiri and held that the suit is to be treated one for declaration of title. The Hon'ble Calcutta High Court said,-

> "The suit as framed was one for recovery of possession. There is some divergence of opinion upon the question whether such a suit is one for possession or for a mere declaration. The Allahabad High Court in Goswami Ranchor Lalji v. Sri Girdharii held that it was the former and therefore governed by 12 years' rule of limitation. In Raja of Venkatagiri v. Isakapalli Subbiah, it was held, dissenting from the above view, that the suit was one for declaration and governed by Article 120 and further that there was no continuing wrong. In our Court also, in the case of Brojendro Kishore Roy Chowdhury v. Bharat Chandra Roy it was held that **the actual possession being with the Magistrate and not with the defendant, the suit could not be treated as a suit for possession, and was not governed by Article 142 of the Limitation Act, and must be treated as one for declaration of title under Section 42 of the Specific Relief Act**. The learned Judges were of opinion that, although the suit was brought more than six years after

> the attachment, the case could aptly be treated as one of continuing wrong within the meaning of section 23 of the Limitation Act and was not therefore barred.
>
> **We agree with the view that the suit though framed as a suit for possession cannot be treated as such, because the possession is not with the defendant but with the Magistrate who is not and cannot be a party to the suit. The article therefore applicable to the suit is Article 120 of the Limitation Act**."
>
> (emphasis supplied)

It may be noticed that in the aforesaid decision in Pannalal the suit was treated within limitation with reference to Section 23 of the Limitation Act with the observations that as on the date of attachment the plaintiff was out of possession only for about 2 months and he had a subsisting title at that time and when the Magistrate's possession is constructive possession of the true owner, the plaintiff was deemed to have been restored to possession constructively, therefore, he would get a fresh starting point as the case could be treated as one of continuing wrong under Section 23 of the Limitation Act. However, in Rajah of Venkatagiri, while applying Article 120, the Madras High Court has not agreed upon applicability of this theory of 'continuing wrong' for such suits.

In the case of Raja Rajgan Maharaja Jagatjit Singh Vs. Raja Partab Bahadur Singh: AIR 1942 Privy Council

47, their Lordships of the Privy Council have also held that Article 47 would not apply as there was no order for possession by the Magistrate and in the suit for declaration of title, Articles 142 and 144 do not apply and agreed with the proposition that the suit was governed by Article 120 of the Limitation Act, 1908.

Thus, the question of limitation has to be answered with reference to the frame of the suit and for that purpose the plaint is required to be examined as a whole. The applicability of the law of limitation depends upon the frame of the suit as brought, and not upon the form in which it could have been or should have been instituted. Further, if an attachment takes place, from the moment of attachment, the possession is of rightful owner.

It has been over emphasized on behalf of the plaintiffs that Article 65 of Limitation Act would apply to the present suit. Article 65 could apply if the suit is for recovery of possession. The core question, therefore, is: whether the present suit could at all be construed as a suit for possession?

The entire frame of the suit has been noticed hereinbefore. The plaintiffs have, after tracing their title and asserting their possession, alleged the acts of disturbance by the defendants by putting forth the claim of Kishan Singh; and have referred to the fact of attachment of the property by the

City Magistrate and have averred that it has become necessary to get the rights determined by the civil court. The reliefs claimed in the plaint have also been reproduced hereinbefore. The reliefs are for declaration of title, injunction against the defendants and for delivery of possession from the receiver. The plaintiffs consciously chose to file the suit at the time when the City Magistrate, Jodhpur by his order dated 18.09.1975 had referred the case to the civil court for finding as to which of the parties were in possession of the disputed property on 23.12.1966 and such reference to the civil court was pending. It was not a suit for recovery of possession at all.

There is substantial weight of authority in favour of the proposition that the possession of the Magistrate is the possession of the true owner. When the actual possession is with the Magistrate and not with the defendant, the suit cannot be treated as one for possession and remains a suit for declaration of title. The proposition, based on concession as stated in Goswami Ranchor Lalji (supra) that the suit would not be of declaratory decree has been dissented in Raja of Venkatagiri and Panna Lal (supra); and with respect, this Court is also unable to subscribe to the view that despite possession being with the Magistrate, the suit by the true owner could be referred to the Articles of the Limitation Act

related with the suits for recovery of possession. In the present case, it has been maintained by the plaintiffs that they continued in possession; and that they never lost possession to the defendants. On the very case set up by them, even upto the date of attachment the possession was of the plaintiffs only; and, obviously, they could not have sued for possession against themselves.

The substratum of submissions for applicability of Article 65 is knocked out once it is clear that the suit in question was not a suit for possession at all. Principles of law to the extent that in the situation of the present nature, the suit is not for recovery of possession but for declaration, as emanating from Rajah of Venkatagiri and Pannalal's case (supra) do directly apply to the present suit. Decisions relied upon by learned counsel for the plaintiffs dealing with suits for recovery of possession rule out their applicability to the present case when it is evident that the present suit cannot at all be construed as a suit for possession.

Having regard to its frame the present suit could only be treated be a suit for declaration and consequential injunction referable to Article 58 of the Limitation Act, 1963 that provides thus:

Description of suit	Period of Limitation	Time from which period being to run

58.	To obtain any other declaration	Three years	When the right to sue first accrues.”

It may be pointed out that Article 58 occurs in Part-III of the Schedule to the Limitation Act, 1963 that deals with "suits relating to declarations". Article 56 thereof relates to the suits for declaration of the forgery of an instrument issued and registered; it provides for the period of limitation of three years that begins to run upon issuance or registration becomes known to the plaintiff. This Article is in fact same as Article 92 of the Act of 1908. Article 57 relates to the suit to obtain a declaration against an alleged adoption and again the period of three years has been provided which begins when the alleged adoption becomes known to the plaintiff. This Article is also the same as Article 118 of the earlier Act of 1908.

Article 58 is a residuary article relating to declaratory suits. This article combines Articles 93, 119 and 129 of the Act of 1908. The Limitation Act, 1908 had provided different articles for the suits for special kind of declaration like the declaratory suits in respect of forged instruments, adoptions, alienations by Hindu and Mohammedan females and a Hindu's right to maintenance. Suits relating to declaration as to a periodically recurring right were covered

by Article 131 therein. In relation to other suits of declaratory nature for which no specific provision in the Act of 1908 was made, they were held falling under the general residuary Article 120 providing for a six-year period of limitation; and it was taken well settled that the said Article 120 would apply to the declaratory suits in respect of immovable property or of an interest therein. Some of the cases in that relation have already been noticed hereinbefore. There being a specific residuary article in relation to the suits for declaration in Part-III of the Schedule to the Act of 1963, obviously the declaratory suits in respect of immovable property or interest therein are now covered by Article 58; and for such suits time beings to run from the day when right to sue first accrues.

It may be noticed that under the Act of 1908 in all cases where residuary Article 120 of that Act applied, the requirement of referring to the date of first accrual of right to sue was not insisted upon and all that was postulated under Article 120 of the Act of 1908 was that time would run from the date when the right to sue accrued. The significant change in law cannot be ignored and the principles of law as available from the decisions above referred dealing with Act of 1908 or its forerunner, i.e. Act of 1877, have to be applied keeping in view the present requirement of law where time begins to run when the right to sue first accrues.

Right to sue exactly when accrues would depend upon facts of a particular case. In relation to an immovable property and rights therein, right to sue would accrue when the plaintiff gets knowledge of denial of title or of interference; because unless the denial is made by a formal act, an oral denial or even one in writing made to a third person and not communicated to the plaintiff cannot give rise to a cause of action to the plaintiff.

The question, then, is whether the present suit for declaration within limitation?

In the present case, it is apparent that actual threat to the rights professed by the plaintiffs came up as early as on 29.12.1965 by the communication of the defendant and then, upon the occupants forcefully preventing the plaintiffs to enter the property on 09.01.1966; apart from other attempts, even if sporadic, when the tenants questioned their title. Even if we do not go that far behind, it is apparent, even going by the plaintiffs own assertions, such threat in unequivocal terms came in the month of November 1966 when a tenant was attempted to be inducted by the defendant on a part of the property and when the defendant put forward the claim of Kishan Singh as true owner of the property. Right to sue definitely accrued to the plaintiffs on such unequivocal threats; they were not ineffective or innocuous threats to the plaintiff's

rights but were indisputably direct, clear and unambiguous threats furnishing cause of action to the plaintiffs; and thereby right to sue accrued to the plaintiffs.

The Hon'ble Madhya Pradesh High Court in the case of Bharat Singh Vs. Kunwar Singh & Anr. : AIR 1991 Madhya Pradesh 368 has summed up the position of law thus:

> "It follows from the above authorities that a distinction has to be drawn between a mere denial of a right or ineffective and innocuous threat to the plaintiff's right on the one hand and a clear and unequivocal threat or infringement of the right asserted by the plaintiff on the other. It is only the later which would set on start of limitation under Art. 58 of the Limitation Act, 1963."

Attachment or any proceeding related thereto has no effect on continuous running of time nor operate so as to suspend or arrest continuous running of time nor could the case be treated as one of continuing wrong. It may be clarified that the propositions as considered by the Hon'ble Calcutta High Court in Panna Lal's case (supra), where though treating it to be a suit for declaration only, it had been taken as matter of continuing wrong cannot be applied in the scheme of Article 58 of the Limitation Act, 1963 where starting point of limitation for a suit of declaration is when the right to sue "First" accrues.

Whatever is the date taken of accrual of such right to sue on the assertion of the plaintiffs themselves whether in the month of November 1966 or even on attachment on 23.12.1966, the suit for declaration and consequential injunction filed on 19.12.1978 could only be treated barred by limitation. As noticed above, relief of recovery of possession from the receiver does not make it a suit for recovery of possession at all. Such relief, in essence, is not more than a relief of declaration that the plaintiffs are entitled to be delivered possession by the receiver. It could be noticed from the very decree granted by the learned trial court that in clause (3) thereof what has been ordered is that the plaintiffs are entitled to receive possession from the receiver, Tehsildar in accordance with law. The suit at hands was never a suit for recovery of possession; and when it were not so, the question of applicability of Article 65 does not arise.

That the plaintiffs consciously chose the present suit only as the one for declaration and consequential injunction is amply borne out from another circumstance. The plaintiffs stated the market value of the property at Rs. 51,000/- in paragraph 24 of the plaint; and presented the plaint on a court fees of Rs. 1,308/- with reference to Section 24 of the Act (obviously, the Rajasthan Court Fees and Suits

Valuation Act, 1961). Section 24 of the said Act of 1961 with its clauses (a) and (b) reads as under:-

> "24. **Suits for declaration**.- In a suit for a declaratory decree or order, whether with or without consequential relief, not falling under section 25-
> (a) where the prayer is for a declaration and for possession of the property to which the declaration relates, fee shall be computed on the market value of the property, subject to a minimum fee of twenty rupees;
> (b) where the prayer is for a declaration and for consequential injunction and the relief sought is with reference to any immoveable property, fee shall be computed on one-half of the market value of the property, subject to a minimum fee of twenty rupees
> xxx xxx xxx"

It was maintained by the plaintiffs before the trial court even while contesting the objection of the defendants about court fees and valuation (that was decided and rejected by the trial court on 11.01.1982) that the suit was properly valued according to Section 24 of the Act of 1961. Now, had it been a suit for possession, court fees shall have been computed on market value of the property; and even if the valuation stated by the plaintiffs at Rs. 51,000/- were adopted, under the Act of 1961 the court fees would have been Rs. 2615/-. It is apparent that taking half of the court fees so payable, and rounding up the fraction, the court fees was computed as Rs. 1308/-. Though such calculation by the plaintiffs is also erroneous, because it ought to have been computed on half of the value

and not as half of the ad valorem court fees; however, leaving such error aside being not relevant for the present purpose, suffice is to notice that the plaintiffs were all through conscious of the fact that they were suing for declaration and injunction only. Reliance upon Article 65 of the Limitation Act in this suit does not appear apposite.

Another factor is that upon the reference made by the City Magistrate, the civil court after enquiry returned its finding on 23.09.1983 (Ex.A/63) and after dealing with the status of each apartment in the property, the learned Addl. Munsif No.2 Jodhpur found the non-applicant No.1 therein, i.e. Kishan Singh, to be in possession of the entire property including the shops and the quarters. Relevant it is to notice that though this order was made during the pendency of the present suit, the plaintiffs never bothered to amend their suit nor took any pleading in relation thereto. The findings therein though were made in a reference under the provisions of Section 146 of the old Cr.P.C. but they were against the plaintiffs and, may be at that point of time the plaintiffs could have adopted suitable proceedings or even amended the present plaint, but the plaintiffs consciously avoided to do so.

Though it has been argued on behalf of the appellants that said findings be treated res judicata and as a consequence thereof, when it is found that plaintiffs were not

in possession two months prior to 23.12.1966, the present suit be treated as time barred with reference to the limitation of 12 years; and such submissions of the appellants have no force for the reason that neither such findings are res judicata nor the period after the date of attachment, i.e. 23.12.1966 would have been counted towards limitation if it were a suit for possession; but this much is clear that the plaintiffs never choose to sue for possession.

It may also be pointed out that the plaintiffs attempted to challenge the said order dated 23.09.1983 in Writ Petition No.2817/1983 that was disposed of by this Court on 18.07.1984. This Court has not decided on the validity of the said order but only observed that it was well known that order under Order 145 Cr.P.C. could be proceeded in a properly instituted civil suit and that such suit (present one) was pending. This Court disposed of the writ petition only with a direction that application for appointment of receiver be disposed of by the trial court within a month and till then the Tehsildar would continue as receiver and further with direction to decide the suit expeditiously. The Tehsildar was of course continued as receiver by the trial court but the fact remains that in the present suit, no pleadings were taken in relation to the said order dated 23.09.1983. It is also relevant to notice that the plaintiffs have filed a replication in this suit on

07.08.1984 as they were permitted to do so on 20.07.1984, obviously after passing of the order by this court in said writ petition No. 2817/1983 on 18.07.1984. However, nothing was pleaded by the plaintiffs in relation to the said order dated 20.09.1983 and the suit was prosecuted in its original form only. With conscious omission on the part of the plaintiffs to sue for possession, the submissions strenuously made by learned counsel Mr. Mehta with reference to Article 65 of the Limitation are of no avail. The suit was for declaration and consequential injunction only and having admittedly been filed much beyond the period of three years from the date of first accrual of cause of action, remains hopelessly barred by limitation and, therefore, deserves to be dismissed.

It may also be noticed that during the course of submissions, learned counsel Mr.Mehta with reference to the decision of the Hon'ble Patna High Court in Raghubar Dayal Prasad Vs. Ramekbal Sah: AIR 1986 Patna 78 submitted that title of the plaintiffs when established, they are entitled to the relief commensurate with such title existing in them and all the necessary reliefs may be granted even if not distinctly pleaded. The submission based on Order 7 Rule 7 CPC in the opinion of this Court cannot be applied to the facts of the case and frame of the present suit. A situation where in a rent and ejectment suit, the defendant admitted original title of the

plaintiff but asserted his title adverse to the plaintiff and claimed title by adverse possession, granting of relief of possession on the basis of title of the plaintiff even when the relationship of landlord and tenant is not established, stands on a footing entirely different. Moulding of relief and granting a decree for possession in favour of the plaintiffs cannot be resorted to in the present case particularly in the frame of the present suit that was for declaration and not for recovery of possession from the defendants.

CONCLUSION

As a result of the aforesaid, this appeal succeeds; impugned decree dated 30.10.1996 is set aside and the suit filed by the plaintiff-respondents is ordered to be dismissed being barred by limitation. Having regard to the circumstances of the case, the parties are left to bear their own costs throughout.

(DINESH MAHESHWARI), J.

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